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No.

In the Supreme Court of the United States

October Term, 1980

YELLOW FREIGHT SYSTEM, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

* * * * *

DUNCAN CERAMICS, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT POPPER
(Counsel of Record)
School of Law
University of Missouri-Kansas City
5100 Rockhill Road
Kansas City, Missouri 64110
(816) 276-1651

RONALD E. SANDHAUS
Attorneys for Petitioners

Of Counsel:
ROBERT G. CARTER
TREVOR C. CLEGG
DEAN A. BAILEY

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Do the Constitution and laws of the United States and the Federal Rules of Criminal Procedure permit an accused corporation to be tried for fifty crimes, each punishable by a maximum of two years in prison and a fine of $20,000, without any pretrial determination by a neutral fact finder that probable cause exists to believe that the crimes were committed and that the accused committed them?

2. Can a corporation charged with a felony under the laws of the United States be deprived of the right to indictment safeguarded by the Fifth Amendment to the United States Constitution?

3. When the crime charged is a federal felony, and no indictment has been returned, are the Federal Rules of Criminal Procedure, laws of the United States or Due Process of Law under the Fifth Amendment violated by permitting the defendant to be tried without any prior judicial determination that there exists sufficient evidence to warrant a belief that the defendant committed the alleged felony?

4. Should this Court exercise its supervisory power over the lower federal courts so as to require a finding that there is probable cause to believe the defendant committed the crime charged, such finding to be made either by a grand jury, magistrate, or judge before the defendant is subjected to a trial for a felony offense.*

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*The caption of the case in this Court lists all parties to the proceeding. Neither of the petitioners has a parent company, and neither has a subsidiary that is not wholly owned.

TABLE OF CONTENTS

Questions Presented I
Table of Authorities V
Opinions Below 2
Jurisdiction 2
Constitutional Provisions, Statutes and Court Rules Involved 2
Statement of the Case 3

Reasons for Granting the Writ—

I. The Decision Below Resolves Important Questions Of Federal Constitutional Law In A Way That Conflicts With Applicable Decisions Of This Court And Other Courts Of Appeals And Which Sanctions A Departure From Prevailing Judicial Procedure That Creates A Dangerous Threat To The Fair Administration Of Justice In The Federal Courts 5

A. Importance of the Question 5
B. Conflict With Applicable Precedent 9

i. The meaning of "infamous crime" and the corporate defendant 9
ii. In the absence of an indictment a judicial determination of probable cause prior to trial was required 18

a. Due Process of Law 18
b. The Federal Rules of Criminal Procedure 24

C. The Court of Appeals Decision Sanctions a Procedure Which So Far Departs From the

Accepted and Usual Course of Judicial Proceedings That It Calls for an Exercise of This Court's Power of Supervision 28

Conclusion 29

Appendix A

Opinion of the United States Court of Appeals for the Ninth Circuit A2

Order of the United States Court of Appeals for the Ninth Circuit A13

Appendix B

Memorandum and Order of the United States District Court, Eastern District of California (United States v. Yellow Freight System, Inc.) A15

Memorandum and Order of the United States District Court, Eastern District of California (United States v. Duncan Ceramics, Inc.) A16

Appendix C

Constitutional Provisions, Statutes and Court Rules A18

Fifth Amendment, United States Constitution A18

1 U.S.C. §1 ..... A18

18 U.S.C. §1 ..... A18

18 U.S.C. §3060 ..... A19

49 U.S.C. §11903 ..... A21

Federal Rules of Criminal Procedure:

5(c) A21

7(a) A22

Table of Authorities

CASES

Albrecht v. United States, 273 U.S. 1 (1927) 22
Application of Jordan, 439 F. Supp. 199 (D. W.Va. 1971) 8
Argersinger v. Hamlin, 407 U.S. 25 (1972) 13
Austin v. United States, 408 F.2d 808 (9th Cir. 1969) 27
Baldasar v. Illinois, 100 S.Ct. 1585 (1980) 13
Baldwin v. New York, 399 U.S. 66 (1970) 13, 16
Beavers v. Henkel, 194 U.S. 73 (1904) 7
Bell v. Burson, 402 U.S. 535 (1971) 21
Bellis v. United States, 417 U.S. 85 (1974) 16
Board of Regents v. Roth, 408 U.S. 564 (1972) 21
Boddie v. Connecticut, 401 U.S. 371 (1971) 21
Brinegar v. United States, 338 U.S. 160 (1949) 27-28
Coleman v. Alabama, 399 U.S. 1 (1970) 24, 25
Coolidge v. New Hampshire, 403 U.S. 443 (1970) 27
Costello v. United States, 350 U.S. 359 (1956) 7, 12
Couch v. United States, 409 U.S. 322 (1973) 16
Curcio v. United States, 354 U.S. 118 (1957) 16
Duncan v. Louisiana, 391 U.S. 145 (1968) 13
Ex parte Bain, 121 U.S. 1 (1887) 7
Ex parte Wilson, 114 U.S. 417 (1885) 9
Fallen v. United States, 378 U.S. 139 (1964) 26
First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 13, 16
Fitzpatrick v. United States, 178 U.S. 304 (1900) 9, 11
Fong Foo v. United States, 369 U.S. 141 (1962) 14
Fuentes v. Shevin, 401 U.S. 67 (1972) 21
Gagnon v. Scarpelli, 411 U.S. 778 (1973) 21, 23

Gerstein v. Pugh, 420 U.S. 103 (1975) 7, 18, 22, 27
Gideon v. Wainwright, 372 U.S. 335 (1963) 13
Giordenello v. United States, 357 U.S. 480 (1958) 26
G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) 15
Goldberg v. Kelly, 397 U.S. 254 (1970) 21
Goss v. Lopez, 419 U.S. 565 (1975) 21
Grosjean v. American Press Co., 297 U.S. 233 (1936) 16
Harvin v. United States, 445 F.2d 675 (D.C. Cir. en banc 1971), *cert. denied*, 404 U.S. 943 (1971) 11
Hawkins v. Superior Court of San Francisco, 150 Cal. Rptr. 435, 586 P.2d 916, 22 Cal. 3d 584 (1978) 25
In re Claasen, 140 U.S. 200 (1891) 9
Jaben v. United States, 381 U.S. 214 (1965) 24
Johnson v. United States, 333 U.S. 10 (1948) 27
Jones v. Robbins, 8 Gray 329 (S. Jud. Ct. Mass. 1857) 18
Louis K. Liggett Co. v. Baldridge, 278 U.S. 105 (1928) 16
Mackin v. United States, 117 U.S. 348 (1886) 9, 11
Marshall v. Barlow's, Inc., 98 S.Ct. 1816 (1978) 15
Mathews v. Eldridge, 424 U.S. 319 (1976) 23, 24
Mempa v. Rhay, 389 U.S. 128 (1967) 13
Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978) 21, 23
Michel v. Louisiana, 350 U.S. 91 (1955) 11
Morrissey v. Brewer, 408 U.S. 471 (1972) 21
North Georgia Finishing, Inc. v. DiChem, Inc., 419 U.S. 601 (1975) 21
Paul v. Davis, 424 U.S. 693 (1976) 22
Pennsylvania Bank & Trust Co. v. Hamisek, 426 F. Supp. 410 (W.D. Pa. 1977) 16
People v. Elliot, 54 Cal. 2d 498, 354 P.2d 225, 6 Cal. Rptr. 753 (1960) 24

Perry v. Sindermann, 408 U.S. 593 (1972) 22
Ross v. Bernhard, 396 U.S. 531 (1970) 16
Safeguard Mutual Insurance Co. v. Miller, 472 F.2d 732 (3rd Cir. 1973) 16
Sciortino v. Zampano, 385 F.2d 132 (2nd Cir. 1967), *cert. denied*, 390 U.S. 906 (1968) 27
Shadwick v. City of Tampa, 407 U.S. 345 (1971) 27
Smith v. United States, 360 U.S. 1 (1959) 12
Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 21
Stirone v. United States, 361 U.S. 212 (1960) 8, 11
United States v. Armco Steel Corp., 252 F. Supp. 364 (S.D. Cal. 1966) 14
United States v. Armored Transport, Inc., 629 F.2d 1313 (9th Cir. October 7, 1980), *certiorari denied*, ... U.S. ....., 49 U.S.L.W. 3643 (March 2, 1981) 5
United States v. American Honda Motor Co., 271 F. Supp. 979 (N.D. Cal. 1967) 14
United States v. American Honda Motor Co., 273 F. Supp. 810 (N.D. Ill. 1967) 14
United States v. Calandra, 414 U.S. 338 (1974) 8
United States v. Greenberg, 320 F.2d 467 (9th Cir. 1963) 19, 27, 28
United States v. Hospital Monteflores, Inc., 575 F.2d 332 (1st Cir. 1978) 14, 15
United States v. Johnson, 585 F.2d 374 (8th Cir. 1978), *cert. denied*, 99 S.Ct. 1246 (1979) 12
United States v. Kahl, 583 F.2d 1351 (5th Cir. 1978) 12
United States v. Kennedy, 5 F.R.D. 310 (D. Colo. 1946) 27
United States v. Macklin, 389 F. Supp. 272 (E.D. N.Y. 1915), *aff'd on other grounds*, 523 F.2d 193 (2d Cir. 1975) 11
United States v. Mandujuano, 425 U.S. 564 (1976) 7, 12

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 14
United States v. Millican, 600 F.2d 273 (5th Cir. 1979) 12, 19, 26, 27, 28
United States v. Moreland, 258 U.S. 433 (1922) 9, 10
United States v. Morgan, 222 U.S. 274 (1911) 27
United States v. Neve, 492 F.2d 465 (7th Cir. 1974) 11
United States v. Owens-Corning Fiberglas Corporation, 271 F. Supp. 561 (N.D. Cal. 1967) 12
United States v. R.L. Polk and Co., 438 F.2d 377 (6th Cir. 1971) 16
United States v. Security National Bank, 546 F.2d 492 (2d Cir. 1976) 14
United States v. Southern Ry., 485 F.2d 309 (4th Cir. 1973) 14
United States v. Wells, 163 Fed. 313 (D. Idaho 1908) 7
United States v. White, 322 U.S. 694 (1944) 16
United States v. Yates, 6 Fed. 861 (E.D. N.Y. 1881) 11
United States ex rel. Wheeler v. Flood, 269 F. Supp. 194 (S.D. N.Y. 1961) 25
Vitek v. Jones, 445 U.S. 480 (1980) 19
Wisconsin v. Constantineau, 400 U.S. 433 (1971) 21, 22

STATUTES AND RULES

1 U.S.C. §1 ..... 2, 3, 4, 6, 12
18 U.S.C. §3006A(b) 13
Section 3060(e) of Title 18, United States Code 2, 19, 26
18 U.S.C. §5005, *et seq.* 10
28 U.S.C. §1254(1) 2
49 U.S.C. §11903 ..... 2, 3, 4, 6
Pub. L. No. 95-473, 92 Stat. 1337 3
United States Constitution, Fourth Amendment 15, 18

United States Constitution, Fifth Amendment 2, 12, 13, 15
United States Constitution, Sixth Amendment 15
United States Constitution, Seventh Amendment 16
A.B.A. ETHICAL STANDARDS, DISCIPLINARY RULE 7-103 (1969) 19
A.B.A. STANDARDS FOR CRIMINAL JUSTICE RELATING TO THE PROSECUTION FUNCTION §3.9 (1971) 19
Federal Rules of Criminal Procedure, Rule 5(c) 2, 19, 24
Federal Rules of Criminal Procedure, Rule 7 .....2, 12
Federal Rules of Criminal Procedure, Rule 9(a) 6
Supreme Court Rule 20.1 2

OTHER AUTHORITIES

Alexander and Portman, *Grand Jury Indictment Versus Prosecution by Information - An Equal Protection - Due Process Issue*, 25 Hastings L.J. 997, 1003 (1974) 23
Charge to Grand Jury, 30 F. Cas. 992 (No. 18,255) (C.C.D. Cal. 1872), 2 Sawy. 667 .....7, 11
Comment, *Preliminary Examination - Evidence and Due Process*, 15 U. of Kan. L. Rev. 374, 376, 380 (1967) 23
28 Criminal Law Reporter 2048, Oct. 8, 1980 8
Developments in the Law - Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions, 92 Harv. L. Rev. 1227, 1344 (1979) 15, 20
Graham and Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal Policy Observations*, 18 U.C.L.A. L. Rev. 635 (1971) 25
La Fave and Scott, Criminal Law, pp. 29-31 (1972) 17
Materials Relating to Prosecutorial Discretion, 24 Crim. L. Rep. (BNA) 3001, 3002 (1978) 20
NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS §1.1 (1973) 19

Note, *A Constitutional Right to Preliminary Hearings for All Pretrial Detainees*, 48 So. Calif. L. Rev. 158, 179-183 (1974) 24

Note, *The Distinction Between Mala Prohibita and Mala in Se in Criminal Law*, 30 Col. L. Rev. 74 (1930) 17

Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 Yale L.J. 771, 783-787 (1974) 23-24

Note, *The Preliminary Hearing - An Interest Analysis*, 51 Ia. L. Rev. 164, 173-174 (1965) 23

Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 American Criminal Law Review 501 (1980) 8

8 WIGMORE, EVIDENCE, §2259(a) (McNaughton rev. 1961) 16

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DUNCAN CERAMICS, INC.,
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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners Yellow Freight System, Inc. and Duncan Ceramics, Inc. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 20, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit was filed October 17, 1980, and in part dismissed the appeal and in part affirmed the District Court's (Eastern District of California) August 28, 1979 denial of the relief requested by the petitioners. On February 20, 1981 the Court of Appeals amended its opinion of October 17, 1980 and denied the petition and suggestion for a rehearing in banc.

The opinion of the Court of Appeals is reported at 637 F.2d 1248. The memoranda and orders of the District Court have not been reported. The opinion, memoranda and orders referred to are reproduced in the Appendices to this petition. Appendix A contains the Court of Appeals' opinion and order. Appendix B contains the District Court's memoranda and orders.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on October 17, 1980. A timely petition for rehearing in banc was denied on February 20, 1981, and this petition for certiorari was filed within sixty days of that date in accordance with Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

The Fifth Amendment to the United States Constitution; 1 U.S.C. §1; 18 U.S.C. §§1, 3060(e); 49 U.S.C. §11903; Federal Rules of Criminal Procedure, Rules 5(c) and 7 have been set forth below in Appendix C.

STATEMENT OF THE CASE

The facts material to the consideration of the questions presented are not in dispute. A summons was served and filed and a fifty-count **felony information** was filed against each petitioner in the United States District Court for the Eastern District of California. The government has expressed its intent to proceed to trial without adhering to any further procedural requirements. No preliminary hearing has been held and no judicial finding has been made determining that there is probable cause to believe that an offense has been committed and that the petitioners committed it. No indictment has been returned against either petitioner. In fact, in the District Court the petitioners asserted upon information and belief that no good faith conscientious decision was ever made by any proper authority that probable cause existed to initiate the prosecution. R. 32-33.[1] The petitioners were denied the opportunity of a hearing in the District Court on this allegation.

The petitioner Yellow Freight System, Inc. ("Yellow"), a corporation engaged in business as a motor carrier, is charged with violating a part of the Interstate Commerce Act known as the Elkins Act. 49 U.S.C. §11903(a) (formerly 49 U.S.C. §41(1)).[2] The information alleges that

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1. Citations to the record refer to the Excerpts of Record filed by Yellow Freight System, Inc., in the Court of Appeals.

2. 49 U.S.C. §11903, a recodification of the prior law, is set forth in Appendix C to this petition. It was enacted subsequent to the filing of the charges in this case [Act of October 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337] but is controlling. Section 3 of Pub. L. 95-473 specifically provides that the recodification "may not be construed as making a substantive change in the laws, replaced, and that:

> "(d) An action taken or an offense committed under a law replaced by sections 1 and 2 of this Act is deemed to have been taken or committed under the corresponding provision enacted by this Act."

Yellow "knowingly" gave concessions to Duncan Ceramics, Inc. ("Duncan") with the result that property was transported in interstate commerce "at a less rate than that named in the tariffs published and filed with the Interstate Commerce Commission." R. 2-5. A similar information was filed against the petitioner Duncan charging Duncan with violating the same statutory provision by "knowingly" accepting the concessions.

In each information, fifty instances of misconduct are alleged, each in a separate count, each count alleging a felony punishable by two years' imprisonment, or a fine of not less than $1,000 nor more than $20,000, or both. 49 U.S.C. §11903(a); 18 U.S.C. §1(1).

The petitioners moved before trial to dismiss the information. R. 7-86. The motions were denied by the district judge. See App. B below. A panel of the United States Court of Appeals for the Ninth Circuit, in part, approved the District Court and, in part, dismissed the appeal. A petition for rehearing in banc was denied. See App. A; 637 F.2d 1248.

The judgment of the Court of Appeals can be summarized briefly. It contained three parts, only two of which are relevant to the present petition.[3] First, the court held that the petitioners' due process claim—that in the absence of an indictment they were entitled to a judicial determination of probable cause—did not involve an "important right that would be lost if we refuse immediate review." In effect, the court held that the petitioners asserted "no interest cognizable under the due pro-

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3. The third part pertained to petitioners' contention that the statute selected by the government as the basis for the prosecution was inapplicable to motor carriers. The Court of Appeals held that this point is not an appropriate one for pre-trial review. Petitioners do not seek review of this portion of the Court of Appeals' decision.

cess clause," and that "the district court's denial of this claim is not immediately applicable."

Second, the Court of Appeals held that whether a crime is infamous for the purpose of triggering the Fifth Amendment's right to be tried on a grand jury's indictment is not governed solely by the possibility of imprisonment in a penitentiary for over one year. Not only the offense but the offender, too, must be considered. Since the petitioners are corporations and can not be imprisoned, the court looked to other indicia and found that at least in this case, where the accuseds are not individuals, the crimes charged must be deemed non-infamous.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Resolves Important Questions Of Federal Constitutional Law In A Way That Conflicts With Applicable Decisions Of This Court And Other Courts Of Appeals And Which Sanctions A Departure From Prevailing Judicial Procedure That Creates A Dangerous Threat To The Fair Administration Of Justice In The Federal Courts.

A. Importance of the Question

In a decision that is literally unprecedented by any other federal appellate court,[4] the Court of Appeals for the Ninth Circuit has endorsed a criminal process which enables a defendant to be subjected to a lengthy trial

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4. Only one other case supports the result below, and that is a decision by the same Court of Appeals rendered ten days before the judgment in the instant case. *United States v. Armored Transport, Inc.*, 629 F.2d 1313 (9th Cir. October 7, 1980), *certiorari denied*, ... U.S. ....., 49 U.S.L.W. 3643 (March 2, 1981).

on serious criminal charges solely on the decision or whim,[5] of the prosecutor.

Each petitioner has been charged by an information alleging fifty instances of misconduct, and it is apparently the government's position that each instance is a violation of the Elkins Act. 49 U.S.C. §11903(a). The conduct proscribed by the statute is made a felony punishable by two years' imprisonment, or a fine of not less than $1,000 nor more than $20,000, or both, so that under the government's theory each petitioner stands charged with fifty felonies. 18 U.S.C. §1(1). The potential aggregate sentence authorized by Congress, according to the government's approach, is a $1 million fine for each petitioner, and had the accuseds been non-corporate individuals, 100 years of imprisonment for each defendant.

The actions were instituted by the filing of the information and the issuance and service of a summons pursuant to Rule 9(a) of the Federal Rules of Criminal Procedure. No indictment was returned, no preliminary hearing was held before the United States Magistrate, and no determination was made by a Magistrate or Judge of the District Court that sufficient facts exist to warrant subjecting the petitioners to the ordeal and expense of defending themselves in a criminal trial.

The decision below resolves the question presented in a way which undermines an important federal safeguard and exposes a significant number of targets of criminal prosecution to the detriments otherwise protected against by the right to indictment by a grand jury. That historic

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5. Petitioners asserted in the District Court and again in the Court of Appeals that no good faith, conscientious decision was ever made by proper authority that probable cause existed to bring the present prosecution. Petitioners were denied the opportunity for a hearing. R. 28, 32-33; brief of petitioner Yellow in Court of Appeals, pp. 3-4, 38-39.

guarantee is vital today for the same reasons that caused its inclusion into the Bill of Rights. It was designed not merely as a way to initiate the trial of a criminal charge, but as a means to protect the accused "against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity." *Ex parte Bain*, 121 U.S. 1, 11 (1887). Indeed it has often been reiterated, and has become well accepted, that that purpose is the primary one. But other goals are subsumed. The grand jury's screening function protects against the hardships imposed by being subjected to an unwarranted trial; it restricts the criminal process so that:

> "no one shall be subjected to the burden and expense of a trial until there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty." *Beavers v. Henkel*, 194 U.S. 73, 84 (1904).

In this way, it prevents oppressive, arbitrary action by the government, protecting the defendant against the unwarranted stigma and expense arising from hasty and malicious prosecutions and unsubstantiated allegations of wrongdoing. See, *Ex parte Bain*, 121 U.S. 1, 11-12 (1887); *Charge to Grand Jury*, 30 F. Cas. 992, 993 (No. 18,255) (C.C.D. Cal. 1872), 2 Sawy. 667; *Gerstein v. Pugh*, 420 U.S. 103, 117 n. 19 (1975); *United States v. Wells*, 163 Fed. 313, 324 (D. Idaho 1908). In keeping with its historic roots, it is still recognized as a protection "to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes." *Costello v. United States*, 350 U.S. 359, 362 (1956). In 1976, Chief Justice Burger, in announcing the judgment of the Court in *United States v. Mandujuano*, 425 U.S. 564, 571, wrote:

> "The grand jury is an integral part of our constitutional heritage which was brought to this country

with the common law. The Framers, most of them trained in the English law and traditions, accepted the grand jury as a basic guarantee of individual liberty; notwithstanding periodic criticism, much of which is superficial, overlooking relevant history, the grand jury continues to function as a barrier to reckless or unfounded charges. 'Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice.' *Costello v. United States*, 350 U.S. 359, 362, 100 L.Ed. 397, 76 S.Ct. 406 (1956). Its historic office has been to provide a shield against arbitrary or oppressive action by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance."

See also, *United States v. Calandra*, 414 U.S. 338, 342-343 (1974); *Stirone v. United States*, 361 U.S. 212, 218 (1960); *Application of Jordan*, 439 F. Supp. 199, 206 (D. W.Va. 1971).

The practical importance of this Fifth Amendment right is not likely to be diminished. During the four fiscal years 1976 through 1979, 574 corporations have been convicted in the federal courts, making it a common event. Orland, *Reflections on Corporate Crime: Law in Search of Theory and Scholarship*, 17 American Criminal Law Review 501 (1980). An announced intention of the Department of Justice to give increased priority to the investigation and prosecution of white collar crime is likely to result in an even greater number of corporate defendants. 28 Criminal Law Reporter 2048, Oct. 8, 1980.

The Court of Appeals decision radically alters the workings of the administration of the criminal law. It

places into the hands of the prosecutor alone, the unchecked, unsupervised power to decide not only what charges to bring but whether, and in what felony cases, to proceed to trial. As demonstrated below, this result is contrary to applicable precedent and to the balance that has previously been achieved in the criminal justice system.

B. Conflict With Applicable Precedent

i. The meaning of "infamous crime" and the corporate defendant.

The Court of Appeals restricted the meaning of the Fifth Amendment protection in a way which conflicts with the decisions of this Court. First, whether a crime is infamous, and therefore triggers Fifth Amendment—grand jury protection, depends upon the crime, not upon the nature of the defendant. And a crime that is infamous is so because of the maximum punishment authorized, not because of what punishment might be imposed in a particular case. As was stated by this Court in 1891, after reviewing earlier decisions:

> "[A] crime which is punishable by imprisonment in the state prison or penitentiary, as is the crime of which the defendant was convicted, is an infamous crime, whether the accused is or is not sentenced or put to hard labor; and that, in determining whether the crime is infamous, the question is, whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one."

In re Claasen, 140 U.S. 200, 205 (1891); see, *Ex parte Wilson*, 114 U.S. 417, 426 (1885); *Mackin v. United States*, 117 U.S. 348, 351 (1886); *Fitzpatrick v. United States*, 178 U.S. 304, 307 (1900); *United States v. Moreland*, 258 U.S. 433, 437, 441 (1922).

Thus, it is the punishment authorized by the legislature which gives a crime its character as infamous. If a crime is deemed serious enough by Congress to assign to it an infamous punishment, then the crime itself is an infamous crime. The reason for this definition of infamous is apparent. The seriousness of certain punishments reflects the ignominy and disgrace which attaches to the offender who violates a law carrying such a sanction. Crimes are infamous because they represent society's judgment about their seriousness, and society's judgment is reflected in the punishment authorized. As Justice Brandeis wrote:

> "Commitment to a penitentiary, with or without hard labor, connotes infamy, because it is proof of the conviction of a crime of such a nature that infamy was a prescribed consequence." *United States v. Moreland*, 258 U.S. 433, 450 (1922) (Brandeis, J. dissenting joined by Taft, C.J. and Holmes, J.).

The grand jury protection was therefore intended to apply when crimes of great magnitude were alleged, and the magnitude is judged by the sentence legislatively authorized for the crime. When the punishment authorized by the legislature for the crime is an infamous one, the accused, whether an individual or a corporation, has a right to insist that there be no trial for that crime except upon the indictment of a grand jury.

Exactly the same approach was adopted by the United States Court of Appeals for the District of Columbia Circuit. That court held that the peculiarities of the defendant (under the age of 22 years) and the actual sentence imposed (up to six years under the Federal Youth Corrections Act, 18 U.S.C. §5005, *et seq.*) do not control the right to indictment. Rather it is the punishment authorized by Congress in the statute alleged to be violated that determines whether the crime (a misdemeanor in

the particular case) is infamous and thus whether adherence to the Fifth Amendment's indictment requirement is essential. As the court stated:

> "[The maximum term of six months' imprisonment authorized by the misdemeanor statute] is the punishment which reflects the prevailing views of the governing authorities, represented by the law, as to the seriousness of the offense—its infamous or non-infamous character." *Harvin v. United States*, 445 F.2d 675, 678 (D.C. Cir. en banc 1971), *cert. denied*, 404 U.S. 943 (1971); but see, *United States v. Neve*, 492 F.2d 465 (7th Cir. 1974).

The court below held that in determining whether a crime is infamous, the "possibility of imprisonment in a penitentiary is only one index." App. A below, at p. A10; 637 F.2d 1248 at 1254. This plainly is wrong; no appellate court has ever held that a crime punishable by over one year is not infamous.[6] To the contrary, the decisions are uniform that a crime punishable by a term of imprisonment in the penitentiary [*i.e.*, by over one year (18 U.S.C. §4083)] is an infamous crime. See, *e.g.*, *Mackin v. United States*, 117 U.S. 348 (1886); *Fitzpatrick v. United States*, 178 U.S. 304, 307 (1900); *Michel v. Louisiana*, 350 U.S. 91, 99 (1955); *Stirone v. United States*, 361 U.S. 212, 215 (1960). Thus, Justice Field, sitting as a Circuit Justice, concluded that the phrase "infamous crimes" embraced all felonies. *Charge to Grand Jury*, 30 F. Cas. 992, 993 (No. 18,255) (C.C.D. Cal. 1872), 2 Sawy. 667; and see, *United States v. Yates*, 6 Fed. 861, 866 (E.D. N.Y. 1881). Felonies are "serious" crimes, and serious crimes are "in-

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6. Only one district court opinion could be found to support the Ninth Circuit's determination: *United States v. Macklin*, 389 F. Supp. 272 (E.D. N.Y. 1915), *aff'd on other grounds*, 523 F.2d 193 (2d Cir. 1975).

famous" crimes. *United States v. Mandujuano*, 425 U.S. 564, 571 (1976); *Smith v. United States*, 360 U.S. 1, 9 (1959); *Costello v. United States*, 350 U.S. 359, 361-362 (1956).

Rule 7(a) of the Federal Rules of Criminal Procedure codifies the case law by concentrating upon the punishment *authorized* for the offense. It is not in terms of either the nature of the offender or the punishment actually imposed. And by definition it includes every felony. See, 18 U.S.C. §1(1). It provides that: "An offense which may be punished by imprisonment for a term exceeding one year [*i.e., all* felonies, 18 U.S.C. §1] or at hard labor shall be prosecuted by indictment." Fed. R. Cr. P. 7(a). The courts have adhered to this test. See, *e.g., United States v. Millican*, 600 F.2d 273, 276 (5th Cir. 1979); *United States v. Johnson*, 585 F.2d 374, 377 (8th Cir. 1978), *cert. denied*, 99 S.Ct. 1246 (1979); *United States v. Kahl*, 583 F.2d 1351, 1355 (5th Cir. 1978); *United States v. Owens-Corning Fiberglas Corporation*, 271 F. Supp. 561, 569 (N.D. Cal. 1967). In sum, when the legislature chooses to make a crime punishable by more than one year in prison, it has designated that crime as infamous for all purposes. Its designation reflects a public policy decision which binds the courts and prosecutors. Any federal defendant convicted of such an offense has been convicted of an infamous crime. Any federal defendant charged with such an offense is charged with an infamous crime. In such cases, the Fifth Amendment's right to indictment applies.

This Court's rulings on the right to counsel and to a jury under the Sixth Amendment are relevant. They adopt the same method of adjudication. Where the crime charged is a felony, the right to counsel automatically applies, and the indigent defendant must be provided with a lawyer at the state's expense irrespective of the sentence

ultimately imposed: *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Baldasar v. Illinois*, 100 S.Ct. 1585, 1592 n. 3 (1980) (Powell, J. dissenting); see, *Mempa v. Rhay*, 389 U.S. 128, 134 (1967); *Argersinger v. Hamlin*, 407 U.S. 25, 44-46 (1972) (Powell, J. concurring); 18 U.S.C. 3006A (b). Similarly, in determining whether a defendant is entitled to a jury, a court must look to the sentence authorized, not to the sentence that is to be imposed. It is the seriousness of the crime charged that governs, the question, and seriousness is measured by the maximum sentence assigned to the offense by the legislature. *Duncan v. Louisiana*, 391 U.S. 145, 159-162 (1968); *Baldwin v. New York*, 399 U.S. 66, 69 (1970).

The Court of Appeals has carved an exception out of the Bill of Rights on grounds not generally honored by this Court or the lower courts. This is reflected by decisions involving corporate defendants and their rights to other constitutional guarantees. Corporate speech has been held to be protected by the First Amendment. *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). The case turned upon whether "the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection." The Court ruled that it did not; that the nature of the speaker does not determine First Amendment protection. The Court's analysis focused on the purpose of the right—to protect the free discussion of governmental affairs—and concluded that that goal requires that the Amendment's protection attach to the speaker whether corporate or individual. *Id.* at 776-777.

A similar analysis produces a similar result under the Fifth Amendment's grand jury protection. The major purpose of the right not to be tried without first being indicted is to protect against the bringing of unfounded charges,

against arbitrary or oppressive prosecutions, and against overzealous prosecutors. Obviously, no good reason would permit such abuses to occur against corporate defendants. Aside from the undesirability of allowing the government to engage in improper conduct as prosecutor, the injury to the corporate defendant in a criminal case can be severe. The mere trial, apart from the conviction, can entail disruption to business, damage to reputation, and loss of trade as well as the substantial expense of conducting a defense. Corporate identity does not justify the deprivation of the grand jury guarantee.

Similarly, government contentions that the double jeopardy clause of the Fifth Amendment does not protect corporations have been rejected. A corporation literally can not be placed "in jeopardy of life or limb," but the policies supporting the safeguard and the potential harm to the corporation exposed to the criminal process without the constitutional protection have convinced the courts that the corporation must be immune from the risks of double jeopardy. *United States v. Hospital Monteflores, Inc.*, 575 F.2d 332, 334-35 (1st Cir. 1978); *United States v. Security National Bank*, 546 F.2d 492, 494-95 (2d Cir. 1976); *United States v. Southern Ry.*, 485 F.2d 309, 312 (4th Cir. 1973); *United States v. Armco Steel Corp.*, 252 F. Supp. 364 (S.D. Cal. 1966); see, *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *Fong Foo v. United States*, 369 U.S. 141 (1962); *United States v. American Honda Motor Co.*, 273 F. Supp. 810 (N.D. Ill. 1967); *United States v. American Honda Motor Co.*, 271 F. Supp. 979 (N.D. Cal. 1967). In reference to the double jeopardy clause, it has been written, in words relevant to the Fifth Amendment's indictment protection:

> "It is true that corporations do not have human emotions, but that does not mean that they do not 'suffer' during criminal trials in the sense of ex-

periencing harm to a legitimate, protectible interest. We can take judicial notice of the fact that corporate well-being is heavily dependent on that elusive quality known as 'good will'. A corporation that falls out of favor with society will suffer. Its suffering may be of a different character than an individual's, but that does not make those sufferings any the less real or hazardous. Corporations can lose money, sometimes substantial amounts, as the result of criminal prosecutions. Corporations can be made very insecure by prolonged periods of bad publicity. This insecurity may not be emotional, but it is very real and may affect the corporation's ability to do business with the public or to raise capital on public markets, among other possible ill effects.

Part of the penal sanction is the criminal stigma that attaches to those who are convicted of crimes. Whether the penalty is imprisonment or a fine, the stigma still attaches, and it will attach whether the accused is an individual or a corporation. 'No corporation, large or small, can escape the "incalculable effect" which a conviction may have on the public attitude toward the company.' *United States v. Security National Bank*, 546 F.2d 492, 494 (2d Cir. 1976)."

United States v. Hospital Monteflores, 575 F.2d 332, 335 (1st Cir. 1978); and see, *Developments in the Law - Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1344 (1979).

Nor are corporations without Fourth Amendment rights. *See, e.g., G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977); *Marshall v. Barlow's Inc.*, 98 S.Ct. 1816 (1978).

The Sixth Amendment right to trial by jury, traditionally determined by a "petty-serious" distinction based

upon the possibility of imprisonment in excess of six months, *see, e.g., Baldwin v. New York*, 399 U.S. 66 (1970), has been applied to guarantee corporations trial by jury. *United States v. R.L. Polk and Co.*, 438 F.2d 377 (6th Cir. 1971). The Court of Appeals in *R.L. Polk and Co.* rejected as "simplistic" the government's argument that since the prevailing rule was "phrased in terms of imprisonment of individuals it has no applicability to corporations which cannot be imprisoned." 438 F.2d at 379.

Corporations are deemed persons for the purpose of being protected by other Constitutional provisions. They receive the benefits of the Seventh Amendment (right to trial by jury in civil cases). See, *Ross v. Bernhard*, 396 U.S. 531, 533-534 (1970). And they are entitled to a full measure of rights under due process of law and equal protection of the laws. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 780 n. 15 (1978); see also, *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 111 (1928); *Safeguard Mutual Insurance Co. v. Miller*, 472 F.2d 732, 733 (3rd Cir. 1973); *Pennsylvania Bank & Trust Co. v. Hamisek*, 426 F. Supp. 410, 412-413 (W.D. Pa. 1977).[7]

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7. An exception to the applicability of the Bill of Rights to corporations is the privilege against self-incrimination. However, the underlying reason for the exception makes it an inappropriate precedent for this case. Historically, compulsion to force someone to be a witness against himself included governmentally imposed physical pressure and torture. But that is not a danger that can be visited upon the corporation or any artificial entity. In this sense, a corporation is not subject to the compulsion element required by the privilege. Although compulsion can be directed at representatives of the corporation, corporate agents, like everyone else, have no standing to refuse to answer on the ground that their testimony might incriminate a third party (the corporation). *Couch v. United States*, 409 U.S. 322, 327-328 (1973). Of course, corporate officers or agents can avail themselves of their own privilege against self-incrimination. See, generally, *United States v. White*, 322 U.S. 694, 699-701 (1944); *Curcio v. United States*, 354 U.S. 118, 123-125, 128 (1957); *Bellis v. United States*, 417 U.S. 85, 89-91 (1974); 8 WIGMORE, EVIDENCE, §2259(a) (McNaughton rev. 1961).

The Court of Appeals' rejection of this important and weighty precedent warrants the granting of certiorari. That rejection occurred even though no interest has been asserted by the prosecution and no governmental interest has been referred to by the courts below which even arguably justifies the removal of the indictment protection.

The opinion below lays down a needlessly intricate test which will be difficult for prosecutors, defendants and courts to apply. Instead of a clear line based on the statutory punishment authorized, the Ninth Circuit's standard requires the determination of such nebulous issues as whether the crime is *mala in se* and the exact philosophical basis for the prison term authorized. Apparently, if the philosophy behind the legislative decision was deterrence then the crime is not infamous, but if it was retributive then there is infamy. See App. A, pp. A11-12, below; 637 F.2d 1248 at 1254-55.

The categorization of crimes as *mala in se* or *malum prohibitum* has led to confusion and inconsistency, and its abandonment has been recommended. See La Fave and Scott, Criminal Law, pp. 29-31 (1972); Note, *The Distinction Between Mala Prohibita and Mala in Se in Criminal Law*, 30 Col. L. Rev. 74 (1930). Similarly, sifting out a particular reason for the prison term authorized by Congress is an arduous—if not impossible—task. The result of the Court of Appeals' own research demonstrates the unsatisfactory results such a probing produces. App. A, p. A12, n. 9, below; 637 F.2d 1248 at 1255, n. 9. Such a multifactor test furnishes no real standard at all, unnecessarily complicating the rule as it has been developed by the courts; namely, an infamous crime is a serious crime as measured by the maximum sentence authorized. If the maximum prison term provided for in the statute

is over one year, it is an infamous crime. If the maximum sentence is one year or less, it is most likely not infamous unless other attributes of infamy are present.

ii. In the absence of an indictment, a judicial determination of probable cause prior to trial was required.

a. Due Process of Law

Not being in custody, the petitioners do not rely on Fourth Amendment law to support their claim that there is a constitutional necessity for a judicial determination of probable cause to believe that sufficient evidence exists to warrant a trial. By relying on Fourth Amendment precedent pertaining to a *pre-charging* requirement [*Gerstein v. Pugh*, 420 U.S. 103, 119 (1975)] and ignoring cases based on the Due Process Clause which are relevant to the petitioners' claim to the necessity for a *pre-trial* finding of probable cause, the Court of Appeals reached a conclusion that conflicts with decisions of this Court.

The Court of Appeals necessarily found that the mere existence of an information, filed by a special assistant prosecutor, should be deemed sufficient to cause a defendant to stand trial. It is perhaps documenting the obvious, but even early precedents recognized the importance of avoiding the damage caused by putting an accused to trial needlessly. Thus, it was held, in the context of the protection afforded by the grand jury that the right ". . . to be secure from an open and public accusation of crime, and from the trouble, expense, and anxiety of a public trial, before probable cause is established . . . is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." *Jones v. Robbins*, 8 Gray 329, 344 (S. Jud. Ct. Mass. 1857).

Yet the Court of Appeals held no "important right" and "no interest cognizable under the due process clause" are asserted by the petitioners. App. A, pp. A7-8, below; 637 F.2d 1248, at 1252-53. In so holding, the court below ignored the realities of the situation, and the legitimate expectation created by the practice in the courts of this country and by the Federal Rules of Criminal Procedure.

The petitioners have both liberty and property interests at stake. Aside from the real and reasonable expectation that all persons in this country have that they will not be forced to trial unless probable cause exists to believe they have committed a crime, and the ethical responsibility of prosecutors to adhere to that principle,[8] which by themselves furnish a sufficient basis for the attachment of due process safeguards, see, *Vitek v. Jones*, 445 U.S. 480 (1980), that conclusion is supported too by Rule 5(c) of the Federal Rules of Criminal Procedure, and by Section 3060(e) of Title 18, United States Code. See below, pp. 24-28. Moreover, the petitioners' expectation is mutual; it is one that is shared by the respondent. The United States Department of Justice has prohibited the institution of any prosecution unless at the minimum, "the attorney for the gov-

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8. This fundamental requisite to the filing of the information is also a requirement under the Code of Professional Responsibility. See, A.B.A. ETHICAL STANDARDS, DISCIPLINARY RULE 7-103 (1969). And the A.B.A. STANDARDS FOR CRIMINAL JUSTICE RELATING TO THE PROSECUTION FUNCTION §3.9 (1971) state that: "It is unprofessional conduct for a prosecutor to institute or cause to be instituted criminal charges when he knows that the charges are not supported by probable cause." See also, NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, COURTS §1.1 (1973). Upon defendant-appellant's information and belief (see affidavit of Stephen P. Murphy at (R. 32-33)), such a conscientious determination was not made by proper authority. Because of this, the petitioners requested a hearing in order to call witnesses and present evidence to establish the truth of the matter. The district judge refused to order such a hearing; that refusal was error. *See, United States v. Millican*, 600 F.2d 273 (5th Cir. 1979); *United States v. Greenberg*, 320 F.2d 467 (9th Cir. 1963).

ernment has probable cause to believe that a person has committed a federal offense."[9]

These interests which the petitioners seek to protect are not minimal; they are important. There is a sufficient probability, indeed a certainty of injury, if fair procedures are not implemented to protect the accused's interests *prior* to trial. Acquittal after a trial does not satisfy the due process requirement. Even a favorable verdict will not save the petitioners from the long, costly ordeal which any criminal trial imposes and which the instant trial necessarily will impose. The expense of preparing for trial has already been great. Nor will a later acquittal eliminate the unfavorable publicity which has already been engendered by the filing of the charges and by the prosecutor's own press release. R. 41-42. The trial itself will inflict damage upon the reputation of the corporations. Finally, their ability to conduct business while defending themselves will be impaired as will their ability to maintain their fiduciary duties to their shareholders.[10]

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9. U.S. Department of Justice *Materials Relating to Prosecutorial Discretion*, 24 Crim. L. Rep. (BNA) 3001, 3002 (1978).

10. See this Petition, pp. 14-15 above. One comment on the applicability of the double jeopardy protection to prevent multiple prosecutions of corporate defendants is pertinent to this point. The comment notes that the courts have stated "that a corporation is just as likely to suffer from the oppression of multiple trials as individuals, since exposure to reprosecution may divert its resources from economic activity, harm its ability to do business or raise capital, and cause embarrassment, expense, and anxiety to the people who make up the corporation. In addition to protecting defendants from harassment, extending double jeopardy protection to corporations furthers the institutional purposes of the clause: that there should be restraints on the power of the government; that prosecutors should not be able to seek unauthorized duplicative punishment; and that the efficiency and integrity of the judicial system should be furthered by adherence to the finality and fairness values expressed in the fifth amendment." (footnotes omitted) *Developments in the Law - Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1344 (1979).

Due process, therefore, applies for "as long as the property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the due process clause." *Goss v. Lopez*, 419 U.S. 565, 576 (1975); see also, *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (Harlan, J. concurring); *Boddie v. Connecticut*, 401 U.S. 371, 378-379 (1971); *Board of Regents v. Roth*, 408 U.S. 564, 570 n. 8 (1972).

Because of the nature of those interests in the present case, they must be protected by a preliminary adversary hearing. This is true despite the facts that a trial ultimately will follow and that the party suffering the loss is a corporation. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); and see, generally, *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 16 (1978); *Goss v. Lopez*, 419 U.S. 565 (1975); *Gaynon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Fuentes v. Shevin*, 401 U.S. 67 (1972); *Bell v. Burson*, 402 U.S. 535 (1971); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

The Court of Appeals' decision conflicts with the above decisions for surely, in light of, and in contrast to, their holdings and the types of interests ordered to be given due process protections, an accused forced to stand trial and defend against criminal charges is entitled to "some kind" of pretrial hearing to protect against an arbitrary loss of his property or liberty interest.

Cases dealing with an individual's reputation also conflict with the decision below. The corporation subjected to a criminal trial suffers serious damage to its reputation, and a corporation's "goodwill," based on its good name, reputation and image of social responsibility, is similar to,

if not greater than, the liberty interest protected by *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). The Court in *Constantineau* held invalid, because done without *first* according a hearing, a posting of a person's name so that sale of liquor to that person would be forbidden for one year. A hearing *after* the name was posted was not sufficient to satisfy procedural due process requirements. Injury to reputation alone may not be sufficient to trigger such due process protection, but when that injury results in a loss of other rights or in an alteration in status—such as ability to buy liquor, or to hold a job, or as here to be free from being tried as a criminal defendant and to suffer the resulting liberty and property losses attendant on the status as a criminal defendant—then due process requires a pre-loss hearing. See, *Paul v. Davis*, 424 U.S. 693, 706-710 (1976); *Perry v. Sindermann*, 408 U.S. 593 (1972). The defendant should not be required to suffer such loss, including expenditure of resources on pre-trial motions, discovery, trial preparation, and its legal defense generally, without **"some kind of hearing"** justifying the government's actions.

A unilateral decision by a prosecutor to try a defendant on criminal charges by the filing of an information is, of course, not **"some kind of hearing."** See, *Gerstein v. Pugh*, 420 U.S. 103, 117 (1975); *Albrecht v. United States*, 273 U.S. 1, 5 (1927). The type of hearing which is due depends on the circumstances, but the general guidelines have been announced:

> "[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute pro-

cedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, *e.g.*, *Goldberg v. Kelly, supra,* 397 U.S., at 263-271, 90 S.Ct., at 1018-1022."

Mathews v. Eldridge, 424 U.S. 319, 334-335 (1976); *Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 17-18 (1978).

These criteria, applied to the instant case, require that a judicial finding of probable cause be made to justify subjecting the petitioners to a trial. As already explained, the interests of petitioners in avoiding the ordeal of a criminal trial are strong. A pre-trial judicial finding that probable cause exists to try the petitioners would be of great value. Much like the grand jury's function, it would guard against unfounded charges or overzealous prosecutors. A hearing, upon which such a probable cause determination would be based, would weed out groundless or unsupported charges and would avoid not only judicial waste but the substantial defense burden and the ignominy that is inevitable for any accused involved in a criminal trial. The trial itself, even if it results in a finding of not guilty, does not adequately protect the defendant, since even a trial resulting in an acquittal can be an exhausting, expensive and damaging procedure. See, *e.g.*, Alexander and Portman, *Grand Jury Indictment Versus Prosecution by Information - An Equal Protection - Due Process Issue,* 25 Hastings L.J. 997, 1003 (1974); Note, *The Preliminary Hearing - An Interest Analysis,* 51 Ia. L. Rev. 164, 173-174 (1965); Comment, *Preliminary Examination - Evidence and Due Process,* 15 U. of Kan. L. Rev. 374, 376, 380 (1967); Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure,* 83 Yale

L.J. 771, 783-787 (1974); and see, *Coleman v. Alabama*, 399 U.S. 1 (1970); *People v. Elliot*, 54 Cal. 2d 498, 354 P.2d 225, 6 Cal. Rptr. 753 (1960).

The government's interest in preventing such a screening mechanism is not compelling, indeed, it is unsubstantial. In fact, such a hearing would not be without benefits to the prosecution.[11] In addition, the preliminary finding that probable cause exists to proceed to trial is already required by the Federal Rules in most cases as discussed below [see, Fed. R. Cr. P. 5(c)]. Generally, for example, if felony charges are brought, the grand jury requirement of the Fifth Amendment satisfies the need for a preliminary finding of probable cause. Thus, the federal rules in most cases will satisfy the requisites of due process. See, *Jaben v. United States*, 381 U.S. 214, 220 (1965). The exception to due process which the Court of Appeals permits is not justified by the standard of *Mathews v. Eldridge*, 424 U.S. 319, 334-335 (1976).

b. The Federal Rules of Criminal Procedure

The decision below is counter to the overall intent of this Court and Congress as embodied in the Federal Rules of Criminal Procedure. Those rules require generally that either an indictment be returned or a preliminary hearing be held. Rule 5(c) provides, for example, that a person charged with a crime, whether in custody or released on bail, "is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court." The hearing otherwise required becomes nones-

11. Note, *The Function of the Preliminary Hearing in Federal Pretrial Procedure*, 83 Yale L.J. 771, 783, 785-786 (1974); and see, Note, *A Constitutional Right to Preliminary Hearings for All Pretrial Detainees*, 48 So. Calif. L. Rev. 158, 179-183 (1974).

sential if it is waived by the defendant, or if an indictment is returned prior to the date set for the preliminary hearing, *or if an information is filed before such date.* Fed. R. Cr. P. 5(c). The latter exception demands greater scrutiny.

Such scrutiny establishes that the so-called exception is not applicable to the case at bar. It is well acknowledged that a preliminary hearing is an important part of the criminal process, affecting critical rights of the defendant. See, *e.g., Coleman v. Alabama,* 399 U.S. 1 (1970); see generally, Graham and Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal Policy Observations,* 18 U.C.L.A. L. Rev. 635 (1971). *United States ex rel. Wheeler v. Flood,* 269 F. Supp. 194 (S.D. N.Y. 1961). While it makes some sense to permit the government to utilize the grand jury finding of probable cause to avoid allowing the defendant to have a preliminary hearing, even there—despite the return of an indictment—the courts have exercised their powers to refuse to deprive the defendant of the opportunity to obtain a *judicial finding* that probable cause exists to proceed to trial. See, *e.g., United States ex rel. Wheeler v. Flood,* 269 F. Supp. 194 (S.D. N.Y. 1961); and see, *Hawkins v. Superior Court of San Francisco,* 150 Cal. Rptr. 435, 586 P.2d 916, 22 Cal. 3d 584 (1978). Given the importance of the preliminary hearing as a device to assure that probable cause exists before subjecting the defendant to trial, it is not rational to allow the avoidance of that hearing by an assistant prosecutor's personal decision embodied in an information. That action by the prosecution, done without leave of court, is no assurance that probable cause really does exist.

It is for these reasons that the right to a preliminary hearing under the Rules should be eliminated only in the rare *appropriate case,* as when the defendant waives

the preliminary hearing or when a substitute form of a judicial finding of probable cause is made. This construction of Rule 5 is supported by the language in section 3060(e) of Title 18, United States Code, which provides that no preliminary hearing is required if prior to the date fixed for the preliminary examination,[12] "an indictment is returned or, *in appropriate cases*, an information is filed against such person in a court of the United States." (Emphasis supplied). See, *United States v. Millican*, 600 F.2d 273 (5th Cir. 1979).

The statute thus limits the Rule 5(c) exception to "appropriate cases." There are then inappropriate cases, and to rigidly deny the defendant a judicial finding of probable cause in every case in which an information has been filed would not be in keeping with the spirit of the Rules, with section 3060 of 18 U.S.C., or with the constitutional requirements. It is pertinent to note in this respect that the Rules were designed to be flexible enough to meet the demands of fairness. As this Court has said in another context: "[T]he Rules are not, and were not intended to be, a rigid code to have an inflexible meaning irrespective of the circumstances." *Fallen v. United States*, 378 U.S. 139, 142 (1964). They must be read in light of the constitutional requirements they implement. See, *Giordenello v. United States*, 357 U.S. 480, 485 (1958).

The design of the Federal Rules of Criminal Procedure has been violated in this case. In all federal prosecutions in which felonies are charged, probable cause must be determined by the grand jury, unless the accused waives that right. It is the grand jury's finding culminating in the indictment that eliminates the necessity for a pre-

12. No such date was ever fixed in the case at bar.

liminary judicial finding of probable cause. *Austin v. United States,* 408 F.2d 808, 810 (9th Cir. 1969); see, *Sciortino v. Zampano,* 385 F.2d 132, 134 (2nd Cir. 1967), *cert. denied,* 390 U.S. 906 (1968). The only exception is the petitioners case, where despite the felony charge, no judicial or grand jury finding of probable cause has been made.

Clearly, "the prosecutor's official oath can not furnish probable cause." *Gerstein v. Pugh,* 420 U.S. 103, 117 (1975); and see, *United States v. Kennedy,* 5 F.R.D. 310 (D. Colo. 1946). Here the information is not even signed by the United States Attorney, but by a "Special Assistant United States Attorney." Moreover, although there is an attached verification, by a "Special Agent of the Interstate Commerce Commission," it is subscribed and sworn to on "information and belief" alone. R. 6. See, *United States v. Greenberg,* 320 F.2d 467 (9th Cir. 1963); *United States v. Millican,* 600 F.2d 273 (5th Cir. 1979).

This then is little or no protection to the defendant faced with the detriments attendant on defending against criminal charges. As has been consistently held in Fourth Amendment cases, a finding of probable cause must be made by a neutral, detached person. See, *e.g., Shadwick v. City of Tampa,* 407 U.S. 345 (1971); *Coolidge v. New Hampshire,* 403 U.S. 443, 449-453 (1970); *Johnson v. United States,* 333 U.S. 10, 13-14 (1948). The "officer engaged in the often competitive enterprise of ferreting out crime" is not the proper person to make the decision. Such a practice can not be squared with basic fairness. See, *Johnson v. United States,* 333 U.S. 10, 13-14 (1948); and see, *Gerstein v. Pugh,* 420 U.S. 103, 112-113 (1975); *Brinegar v. United States,* 338 U.S. 160, 176 (1949). The judicial finding "furnishes the nearest practicable safeguard against malicious accusations," *United States v. Morgan,* 222 U.S. 274, 282 (1911), as well as against capricious ones. *Brine-*

gar v. United States, 338 U.S. 160, 176 (1949). Plainly, a summons issued or an information filed without judicial involvement does not meet Fourth Amendment requirements. It should not be held to satisfy basic requirements of fairness under the Fifth Amendment; nor should it be deemed sanctioned by the Federal Rules of Criminal Procedure.

C. The Court of Appeals Decision Sanctions a Procedure Which So Far Departs From the Accepted and Usual Course of Judicial Proceedings That It Calls for an Exercise of This Court's Power of Supervision.

For all of the reasons given above, even if the issues resting on the Constitution, statute and rules are not reached, fairness and good practice in the administration of the federal criminal law calls for this Court to exercise its supervisory power to correct the decision below. The petitioners are being forced to trial without a modicum of procedural protection. There has been no indictment, no judicial finding that probable cause exists to proceed to trial, and no chance given the accuseds to challenge and refute the assumption that a valid finding of probable cause was ever made by the appropriate prosecuting official. Even the information itself fails to satisfy the requirements that it demonstrate—on its face—an adequate basis for a probable cause finding. Instead, it recites the allegations in conclusory terms much as an indictment would. This is improper and inadequate, since no finding of probable cause has been made by a court or grand jury. *United States v. Greenberg*, 320 F.2d 467 (9th Cir. 1963); *United States v. Millican*, 600 F.2d 273 (5th Cir. 1979).

Ironically, had the government proceeded against the petitioners by instituting a civil action in order to obtain

a civil forfeiture amounting to three times the rebate allegedly improperly given or received (49 U.S.C. §11902), the petitioners would have been protected by adequate procedures. Under the Rules of Federal Civil Procedure they would have had the opportunity to gain full discovery and in effect to obtain a probable cause determination by a judicial ruling on a motion for summary judgment.

By bringing a criminal action, the government has severely curtailed the pre-trial procedural safeguards available, while seeking fines of $1 million against each petitioner. The government unfairly has upped the ante but lowered the quality of procedural justice available to the petitioners.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the judgment and opinion of Court of Appeals for the Ninth Circuit.

Respectfully submitted,

ROBERT POPPER
(Counsel of Record)
School of Law
University of Missouri-Kansas City
5100 Rockhill Road
Kansas City, Missouri 64110
(816) 276-1651

RONALD E. SANDHAUS
Attorneys for Petitioners

Of Counsel:
ROBERT G. CARTER
TREVOR C. CLEGG
DEAN A. BAILEY

April, 1981

APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the Ninth Circuit

(Filed October 17, 1980)

637 F2d 1248

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-1665
DC No. F-77-227-Cr.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

YELLOW FREIGHT SYSTEM, INC.,
Defendant-Appellant.

No. 79-1666
DC No. F-77-228-CR.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DUNCAN CERAMICS, INC., a
corporation,
Defendant-Appellant.

OPINION

Appeal from the United States District Court
for the Eastern District of California
M. D. Crocker, District Judge, Presiding
Argued and Submitted August 11, 1980

Before: KILKENNY and FARRIS, Circuit Judges and BELLONI,* District Judge.

FARRIS, Circuit Judge:

Yellow Freight System, Inc., and Duncan Ceramics, Inc., appeal the district court's denial of various pretrial motions to dismiss informations filed against them. Appellee United States moves to dismiss the appeals for lack of appellate jurisdiction. We dismiss in part and affirm in part.

On November 30, 1977, the United States served Yellow Freight and Duncan Ceramics with summonses and filed informations alleging that on fifty occasions Yellow Freight knowingly gave and Duncan Ceramics knowingly received rate concessions on interstate shipments of goods. The Elkins Act proscribes rate concessions and imposes a penalty of $1000 to $20,000 fine and up to two years' imprisonment in a penitentiary for granting or receiving rate concessions. 49 U.S.C. § 41(1), (3) (1976).[1]

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*Honorable Robert C. Belloni, U.S. District Judge for the District of Oregon, sitting by designation.

1. The Act of October 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337, recodified the substantive provisions involved in this case. Prior to this Act, the Elkins Act was codified at 49 U.S.C. §§ 41-43 (1976), but title 49 was not enacted as codified. The penal provisions of the Elkins Act now appear at 49 U.S.C. § 11903. Because the crimes charged allegedly took place before the 1978 Act, we use the 1976 codification in referring to the Elkins Act. The 1978 Act did not, however, purport to make any changes in substantive law. *See* Act of Oct. 17, 1978, Sec. 3(a), Pub. L. No. 95-473, 92 Stat. 1337, 1466.

On April 3, 1979, Yellow Freight and Duncan Ceramics filed a set of motions in the district court to dismiss the informations. In part these motions claim that the Elkins Act does not apply to motor carriers. In addition, however, this set of motions alleges that the informations are procedurally insufficient because (1) the crimes alleged are infamous and therefore must be prosecuted by grand jury indictment and (2) in any event the prosecution may not proceed without a preliminary determination of probable cause. The district court denied these motions.

I. *Appellate Jurisdiction*

Yellow Freight and Duncan Ceramics seek to base appellate jurisdiction on 28 U.S.C. § 1291 (1976), which grants appeals of right from "final decisions of the district courts." Specifically, they attempt to characterize the denial of their second set of motions as a "collateral order" appealable as a final decision under the rationale of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545-47 (1949).

As applied to criminal pretrial orders, this rationale confers appellate jurisdiction when:

1. The pretrial order fully disposed of the appellants' claim;

2. The appellants' claim is collateral to, and separable from, the principal issue of guilt or innocence; and

3. The order involves an important right that would be lost if review had to await final judgment.

See Abney v. United States, 431 U.S. 651, 658-62 (1977); *United States v. Griffin*, 617 F.2d 1342, 1344-46 (9th Cir. 1980). Inquiry into the immediate appealability of a particular pretrial order must focus upon each claim asserted.

Thus immediate appealability of one of the defendants' claims will not confer pendent appellate jurisdiction over defendants' other claims. *Abney v. United States*, 431 U.S. 651, 662-63 (1977).[2] Accordingly, the threshold issue of appellate jurisdiction must be addressed for each of the three claims asserted by the defendants, Yellow Freight and Duncan Ceramics.

A. *Elkins Act Contention.*

Yellow Freight and Duncan Ceramics claim that the particular provisions of the Elkins Act asserted in this case do not apply to motor carriers is not immediately appealable. The issue is "plainly not 'collateral' in any sense of that term." *Abney*, 431 U.S. at 663. It "may be reviewed effectively, and, if necessary, corrected if and when a final judgment results." *Id.* We accordingly grant the motion to dismiss the appeal as to the defendants' substantive claim.

B. *Indictment Clause Contention.*

Yellow Freight and Duncan Ceramics contend that they have been charged with an infamous crime for which they may not, under the indictment clause of the Fifth Amendment, be "held to answer" except upon grand jury indictment. This claim meets all three of the standards for immediate appealability. Denial of defendants' motion completely and finally determined their claim in the trial

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2. Citing C. A. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3937, at 58 n.5 (Supp. 1980), Duncan Ceramics contends that *Abney* imposed no blanket prohibition of pendent appellate jurisdiction but merely held that pendent review was inappropriate in that case. Subsequent cases have not adopted so narrow a reading of *Abney*. *See, e.g., United States v. MacDonald*, 435 U.S. 850, 857 n.6 (1978); *United States v. Klein*, 582 F.2d 186, 196 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *United States v. Cerilli*, 558 F.2d 697, 699-700 (3d Cir.), *cert. denied*, 434 U.S. 966 (1977).

court. Allowing the trial to progress so that facts may develop will not facilitate consideration of their claim. *Cf. United States v. MacDonald*, 435 U.S. 850 (1978) (no immediate appeal of denial of speedy trial claim under Sixth Amendment because determination of merits of claim depends on circumstances surrounding trial). Second, the entitlement of Yellow Freight and Duncan Ceramics to an indictment before prosecution is wholly collateral to and independent of the issue of their guilt on the underlying charges. Finally, the claim involves a right that would be irretrievably lost if the defendants were forced to stand trial before appeal. One purpose of the indictment clause is to shield defendants from unwarranted prosecution for serious crimes. *Wood v. Georgia*, 370 U.S. 375, 390 (1962); *Stirone v. United States*, 361 U.S. 212, 218 & n.3 (1960); *Gaither v. United States*, 413 F.2d 1061, 1066 (D.C. Cir. 1969); *United States v. Cox*, 342 F.2d 167, 170 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *see also United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974). Like the contentions held immediately appealable in *Abney* and *Griffin*, therefore, this claim "involves a right to be free from prosecution itself, rather than merely to be free from subsequent conviction." *Griffin*, 617 F.2d at 1345; *see Abney*, 431 U.S. at 660-62. We therefore deny the motion to dismiss with respect to this claim.[3]

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3. *In re Fendler*, 597 F.2d 1314 (9th Cir. 1979), does not require a different result. That case involved a denial of a petition to conduct a voir dire of grand jurors regarding possible bias. Such attacks on the procedure followed by a grand jury are ordinarily not immediately appealable. The present case, on the other hand, involves a claim that trial itself cannot proceed except according to a grand jury indictment.

The issue of the immediate appealability of indictment clause claims was presented, but apparently not decided, in *Helstoski v. Meanor*, 442 U.S. 500 (1979). A former congressman was charged by indictment with soliciting money from aliens in return for introduction of private bills in Congress. The indict-

(Continued on following page)

C. *Due Process Contention.*

Finally, Yellow Freight and Duncan Ceramics contend that, even if they may be prosecuted by information, they are entitled to a preliminary hearing on the issue of probable cause. They assert that the trial itself will deprive them of protected liberty and property interests and argue that due process requires a hearing. This contention fulfills the first two elements of the *Abney* test. It has been fully disposed of by the trial court and is separable from the principal issue of guilt or innocence. At first blush, it also appears to meet the third element of the *Abney* test. If review must await final judgment, the defendants will have been subjected to a trial from which they assert they are constitutionally immune.

Since *Abney*, many appeals from pretrial orders have come before us. In these appeals defendants have demonstrated remarkable ability to frame almost any argument to meet the *Abney* test. Because the filing of an appeal allowable under *Abney* deprives the trial court of jurisdiction to proceed with trial, *Moroyoqui v. United States*, 570 F.2d 862, 864 (9th Cir. 1977), *cert. denied*, 435 U.S. 997 (1978), defendants delay their trial when they pursue *Abney* appeals. So that defendants need not completely forego speedy trial to seek vindication of the rights pro-

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Footnote continued—

ment referred to legislative acts of the congressman. He claimed that trial according to the indictment would violate the speech or debate clause and that trial not according to the indictment would violate his indictment clause "right to be tried only on an indictment in precisely the form issued by a grand jury." *Id.* at 505. The Supreme Court, characterizing the claim as arising under the speech or debate clause, ruled that his claim was immediately appealable. *Id.* at 506-08. *Helstoski* does not squarely stand for the proposition that indictment clause claims are immediately appealable because the Court may have assumed that trial would proceed according to the indictment.

tected by *Abney*, we must adopt procedures to dispose of these appeals as quickly as fair consideration permits.

We therefore hold that, in order to show that his or her claim involves an important right requiring immediate review, a defendant must first identify a valid principle of law that can apply to his or her case. *See United States v. Perkins*, 433 F.2d 1182, 1183, 1186 (D.C. Cir. 1970) (dismissing *Abney*-type appeal because issues posed were insubstantial). The defendant must then show that the principle confers an important right and that the right can only be preserved by immediate review. Failing such showings, an *Abney* appeal will not survive a motion for dismissal for lack of appellate jurisdiction.

Despite defendants' artful pleading, their final claim involves no important right that would be lost if we refuse immediate review. Although a defendant arrested or otherwise restrained has a Fourth Amendment right to a preliminary hearing on the issue of probable cause, absent restraint a prosecution may be maintained without any finding of probable cause. See *Gerstein v. Pugh*, 420 U.S. 103 (1975), where after holding that an arrested defendant is entitled to a judicial determination of probable cause independent of the prosecutor's decision to file an information, *id.*, at 117-18, the Court continued:

> In holding that the prosecutor's assessment of probable cause is not sufficient alone to justify restraint of liberty pending trial, we do not imply that the accused is entitled to judicial oversight or review of the decision to prosecute. Instead, we adhere to the Court's prior holding that a judicial hearing is not prerequisite to prosecution by information. *Beck v. Washington*, 369 U.S. 541, 545 (1962); *Lem Woon v. Oregon*, 229 U.S. 586 (1913).

Id. at 118-19.[4] Thus, defendants have identified no interest cognizable under the due process clause. Because defendants assert a claim based upon a legal theory foreclosed by the Supreme Court, their claim does not involve an "important right," 431 U.S. at 658, the third element of the *Abney* test is not met, and the district court's denial of this claim is not immediately appealable.[5]

II. *Prosecution of Corporations by Information*

Yellow Freight and Duncan Ceramics contend that because they stand charged with offenses punishable by two years in a penitentiary, they may be prosecuted not by information, but only by grand jury indictment. The Fifth Amendment states that "[n]o person shall be held to an-

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4. *See also* 420 U.S. at 125 n.26 ("Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty *other than the condition that they appear for trial.*") (emphasis added); *United States v. Pickard*, 207 F.2d 472, 474-75 (9th Cir. 1953) (absent arrest, prosecution by information may proceed without oath or affirmation of probable cause); *Church v. United States*, 412 F.2d 836, 838 (9th Cir. 1969) (same). *But cf. United States v. Millican*, 600 F.2d 273, 276-77 (5th Cir. 1979) (holding that a summons is sufficient restraint to invoke probable cause requirement, where failure to appear on summons may result in issuance of warrant), *cert. denied*, 100 S.Ct. 1274 (1980).

5. The rule we establish today may apply in other circumstances. For example, it might permit dismissal of *Abney* appeals founded on statutes not in force or on overruled cases. We find it unnecessary to define the contours of this rule, other than to state that defendants' indictment clause contention is appealable while their due process contention is not. As future cases affect the merits of particular claims, of course, the immediate appealability of those claims may change.

We have recently adopted an internal procedure for expedited disposition of *Abney* appeals on their merits under 9th Cir. R. 6(h). *United States v. Miranda-Parra*, No. 80-1450, slip. op. at 4411, 4413-14 (9th Cir. July 28, 1980); *see also Abney*, 431 U.S. at 662 n.8. Using this procedure, we disposed of the appeal in *Miranda-Parra* in less than five weeks. Although the 6(h) procedure seems generally preferable, our ruling today ensures that a motions panel of this court can dispose of frivolous *Abney* appeals even when 6(h) has not been invoked.

swer for . . . [an] infamous crime, unless on . . . indictment of a Grand Jury." Relying on United States Supreme Court pronouncements that infamous crimes are those "punishable by imprisonment in a penitentiary," *e.g., Green v. United States*, 356 U.S. 165, 183 (1958), defendants contend that they have been charged with infamous crimes and may not be prosecuted except on grand jury indictment.

In response, the United States notes that both defendants are corporations and therefore not amenable to imprisonment. It accordingly contends that this prosecution may proceed by information alone. *See United States v. Macklin*, 389 F. Supp. 272, 273 (E.D.N.Y.), *other holdings aff'd*, 523 F.2d 193 (2d Cir. 1975).

We agree with the United States that potential confinement in a penitentiary of some violators of a criminal statute does not render all violations of that statute "infamous." Congress may impose different punishments upon different classes of criminals. It has done so in the provisions of the Elkins Act here in question: the Act by its terms limits penitentiary confinement to individuals.[6] We do not, however, rest our holding upon this express recognition by Congress of practical limitations on punishment for corporate crime. Where, as in this case, a criminal statute makes violations punishable by imprisonment in a penitentiary, corporate violations of that statute are not automatically made infamous crimes by the possible infliction of such punishment on individuals.

Defendants argue that such a result completely deprives corporations of the right to grand jury protection.

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6. While the Elkins Act imposes a $1000 to $20,000 fine on "[e]very person or corporation" who knowingly gives or receives a concession, the provision imposing imprisonment applies only to "any person or any officer or director of any corporation." 49 U.S.C. § 41(1) (1976). Thus, by its own terms the imprisonment provision of the Elkins Act does not apply to corporations.

We disagree. The possibility of imprisonment in a penitentiary is only one index of whether a crime is infamous.[7] Aside from tests of infamy that hinge on the possibility of punishment to which corporations are not amenable, the Supreme Court has occasionally suggested other incidents of infamy. For example, in *Ex parte Wilson*, 114 U.S. 417, 423-24 (1885), the Court suggested that the Fifth Amendment may require indictment for "crimes infamous in their nature, independently of the punishment affixed to them."[8] In *Wilson* the Court also indicated that a congressional declaration of infamy might suffice. *Id.* at 426; *see also United States v. Waddell*, 112 U.S. 76, 82 (1884) (remanding to the circuit court to determine the "very serious question whether *this* crime is not made an infamous one by the language of the statute," which precluded violators from holding office; considered separately from punishment, the Court thought the language was "an indelible disgrace affixed to the party convicted"); *Ullmann v. United States*, 350 U.S. 422, 451 n.5 (1956) (Douglas, J., dissenting). In addition, crimes punishable at common law by civil disabilities were deemed infamous. The indictment clauses of several state constitutions are interpreted

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7. The punishment attached to a crime is relevant to the determination of infamy because it indicates the character of the crime as perceived by Congress and the public. *See Mackin v. United States*, 117 U.S. 348, 351, 352-53, 354 (1886) (in light of common perception, crimes punishable by confinement to a penitentiary are infamous); *Ex parte Wilson*, 114 U.S. 417, 427-28 (1885) (for similar reason, crimes punishable by confinement at hard labor are infamous). In the case of crimes by individuals, the possibility of imprisonment for more than one year, and therefore in a penitentiary, remains the most reliable index of infamy. *See United States v. Driscoll*, 612 F.2d 1155, 1156 (9th Cir. 1980). It would be extremely rare for a crime by an individual that did not carry infamous punishment to be made infamous by some other factor.

8. *But see Weeks v. United States*, 216 F. 292, 298 (2d Cir.) (infamy depends solely on character of punishment), *cert. denied*, 235 U.S. 697 (1914); *Low v. United States*, 169 F. 86, 89 (6th Cir. 1909) (same; dictum).

to require indictment for such crimes, *e.g., Elkin v. Commonwealth,* 269 Ky. 6, 8, 106 S.W.2d 83, 84 (1937), and at least one federal court has suggested that such crimes are infamous within the meaning of the Fifth Amendment, *Hunter v. United States,* 272 F. 235, 238 (4th Cir.), *cert. denied,* 257 U.S. 633 (1921).

Since we hold that imposition of potential imprisonment on individuals violating a criminal statute does not of itself make corporate violations of the same statute infamous crimes, the only remaining question is whether another factor renders the crimes charged in this case infamous. The crimes charged are not made infamous by the penalties attached to them, because those penalties are only fines. A fine, regardless of its amount, cannot be infamous punishment. *See United States v. Armored Transport, Inc.,* No. 79-1620, filed op. at 9-10 (9th Cir. Oct. 7, 1980). Nor is this crime inherently infamous. The class of inherently infamous crimes, if it exists at all, would encompass only the most serious *mala in se.* Regulatory crimes, such as those charged in this case, are not inherently infamous.

The only perceptible basis for holding these crimes infamous would be that Congress has declared these crimes infamous by attaching the penalty of imprisonment in a penitentiary to similar crimes committed by individuals. The history of the statutes involved precludes such a basis. Congress enacted the Elkins Act in 1903. In place of the present provisions for penitentiary sentences, the original Act provided:

> In all convictions . . . for offenses under [various acts regulating interstate commerce] . . . no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished.

Elkins Act, ch. 708, § 1, 32 Stat. 847, 847 [sic] (1903). The present provision was added three years later by the Hepburn Act, ch. 3591, § 2, 34 Stat. 584, 588 (1906). Although the Hepburn Act originated in the House, its restoration of the penalty of imprisonment was the result of a Senate amendment. The floor debate on the amendment indicates that the amendment was designed to enforce more effectively the ban on concessions, rather than to brand the giving of rebates with a special mark of infamy.[9] The violations charged here are not infamous crimes. We affirm the district court's denial of defendants' motion to dismiss.

In summary, we grant the motion to dismiss this appeal with respect to the defendants' Elkins Act and due process claims. With respect to the defendants' indictment clause claim, the motion to dismiss the appeal is denied; because the violations charged are not infamous crimes, however, we affirm the district court's rejection of that claim.

Dismissed in part and affirmed.

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9. 40 Cong. Rec. 6620-28 (1906). There were actually three competing proposals on the Senate floor to reestablish the penalty of imprisonment. Throughout the floor debate, various speakers stressed the deterrent purpose of the penalty, thus negating any inference that Congress intended the penalty as an expression of the infamous character of the crime. *But see* 40 Cong. Rec. 6625 (statement of Sen. Daniel) (suggesting a retributive purpose). Any assertion that the amendment rendered granting of concessions an infamous crime is further undercut by the fact that all three proposals denominated the offense a misdemeanor.

Order of the United States Court of Appeals for the Ninth Circuit

(Filed February 20, 1981)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-1665
DC No. F-77-227-Cr.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

YELLOW FREIGHT SYSTEM, INC.,
Defendant-Appellant.

No. 79-1666
DC No. F-77-228-CR.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DUNCAN CERAMICS, INC., a corporation,
Defendant-Appellant.

ORDER

Before: KILKENNY and FARRIS, Circuit Judges, and BELLONI,* District Judge.

The panel as constituted in the above cases has voted to deny the petition for rehearing. Judge Farris has voted to reject the suggestion for a rehearing en banc and Judges Kilkenny and Belloni recommend such rejection.

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*The Honorable Robert C. Belloni, United States District Judge for the District of Oregon, sitting by designation.

The opinion filed October 17, 1980 shall be amended as follows:

Change the first paragraph of footnote 3 to read:

> [3]*In re Fendler*, 597 F.2d 1314 (9th Cir. 1979), does not require a different result. That case involved a denial of a petition to conduct a voir dire of grand jurors regarding possible bias. Such attacks on the procedure followed by a grand jury are ordinarily not immediately appealable *United States v. Garner*, 632 F.2d 758, 765 (9th Cir. 1980). The present case, on the other hand, involves a claim that trial itself cannot proceed except according to a grand jury indictment. *See id.* (reserving question).

The full court has been advised of the proposal to amend the opinion, and of the suggestion for en banc rehearing, and no judge has objected to the amendment or requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected. The opinion filed October 17, 1980 is amended as set forth above.

APPENDIX B

Memorandum and Order of the United States District Court, Eastern District of California (United States v. Yellow Freight System, Inc.)

(Filed August 28, 1979)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. F-77-227 Cr.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

YELLOW FREIGHT SYSTEM, INC., a corporation,
Defendant.

MEMORANDUM AND ORDER

On May 7, 1979, the court took under submission defendant's motions to dismiss or stay the proceedings.

On May 17, 1979, the court granted the motion to stay pending the Supreme Court's decision in *U. S. v. Batchelder,* but did not rule on the motion to dismiss.

Defendant is not satisfied with the *Batchelder* case and has offered additional arguments on it's [sic] motion to dismiss, none of which are persuasive.

"Infamous crime" as used in the Fifth Amendment, requiring presentment or indictment of a grand jury, has traditionally been defined in terms of punishment rather than the nature of the offense.

Defendant is a corporation and cannot be punished by imprisonment in a penitentiary, so it may be charged by information.

Therefore, defendant's motion to dismiss is denied and trial is set for Dec. 11, 1979, at 10:00 a.m.

DATED: August 28, 1979.

/s/ M. D. Crocker
United States District Judge

Memorandum and Order of the United States District Court, Eastern District of California (United States v. Duncan Ceramics, Inc.)

(Filed August 28, 1979)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. F-77-228 Cr.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DUNCAN CERAMICS, INC., a corporation,
Defendant.

MEMORANDUM AND ORDER

On May 7, 1979, the court took under submission defendant's motions to dismiss or stay the proceedings.

On May 17, 1979, the court granted the motion to stay pending the Supreme Court's decision in *U.S. v. Batchelder*, but did not rule on the motion to dismiss.

Defendant is not satisfied with the *Batchelder* case and has offered additional arguments on it's [sic] motion to dismiss, none of which are persuasive.

"Infamous crime" as used in the Fifth Amendment, requiring presentment or indictment of a grand jury, has

traditionally been defined in terms of punishment rather than the nature of the offense.

Defendant is a corporation and cannot be punished by imprisonment in a penitentiary, so it may be charged by information.

Therefore, defendant's motion to dismiss is denied and trial is set for Dec. 11, 1979, at 10:00 a.m.

DATED: August 28, 1979.

/s/ M. D. Crocker
United States District Judge

APPENDIX C

Constitutional Provisions, Statutes and Court Rules

The Fifth Amendment to the United States Constitution provides in its relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; . . . nor be deprived of life, liberty, or property, without due process of law; . . . .

United States Code, Title 1:

> §1 Words denoting number, gender and so forth
>
> In determining the meaning of any Act of Congress, unless the context indicates otherwise—
>
> * * *
>
> the words "person" and "whoever" include corporations, . . . as well as individuals; . . . .

United States Code, Title 18:

> §1. Offenses classified
>
> Notwithstanding any Act of Congress to the contrary:
>
> (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
>
> (2) Any other offense is a misdemeanor.
>
> (3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense.

§ 3060. Preliminary examination

(a) Except as otherwise provided by this section, a preliminary examination shall be held within the time set by the judge or magistrate pursuant to subsection (b) of this section, to determine whether there is probable cause to believe that an offense has been committed and that the arrested person has committed it.

(b) The date for the preliminary examination shall be fixed by the judge or magistrate at the initial appearance of the arrested person. Except as provided by subsection (c) of this section, or unless the arrested person waives the preliminary examination, such examination shall be held within a reasonable time following initial appearance, but in any event not later than—

(1) the tenth day following the date of the initial appearance of the arrested person before such officer if the arrested person is held in custody without any provision for release, or is held in custody for failure to meet the conditions of release imposed, or is released from custody only during specified hours of the day; or

(2) the twentieth day following the date of the initial appearance if the arrested person is released from custody under any condition other than a condition described in paragraph (1) of this subsection.

(c) With the consent of the arrested person, the date fixed by the judge or magistrate for the preliminary examination may be a date later than that prescribed by subsection (b), or may be continued one or more times to a date subsequent to the date

initially fixed therefor. In the absence of such consent of the accused, the date fixed for the preliminary hearing may be a date later than that prescribed by subsection (b), or may be continued to a date subsequent to the date initially fixed therefor, only upon the order of a judge of the appropriate United States district court after a finding that extraordinary circumstances exist, and that the delay of the preliminary hearing is indispensable to the interests of justice.

(d) Except as provided by subsection (e) of this section, an arrested person who has not been accorded the preliminary examination required by subsection (a) within the period of time fixed by the judge or magistrate in compliance with subsections (b) and (c), shall be discharged from custody or from the requirement of bail or any other condition of release, without prejudice, however, to the institution of further criminal proceedings against him upon the charge upon which he was arrested.

(e) No preliminary examination in compliance with subsection (a) of this section shall be required to be accorded an arrested person, nor shall such arrested person be discharged from custody or from the requirement of bail or any other condition of release pursuant to subsection (d), if at any time subsequent to the initial appearance of such person before a judge or magistrate and prior to the date fixed for the preliminary examination pursuant to subsections (b) and (c) an indictment is returned or, in appropriate cases, an information is filed against such person in a court of the United States.

(f) Proceedings before United States magistrates under this section shall be taken down by a court reporter or recorded by suitable sound recording

equipment. A copy of the record of such proceeding shall be made available at the expense of the United States to a person who makes affidavit that he is unable to pay or give security therefor, and the expense of such copy shall be paid by the Director of the Administrative Office of the United States Courts.

United States Code, Title 49:

§11903. Rate, discrimination, and tariff violations

(a) A person that knowingly offers, grants, gives, solicits, accepts, or receives by any means transportation or service provided for property by a common carrier subject to the jurisdiction of the interstate Commerce Commission under chapter 105 of this title (1) at less than the rate in effect under chapter 107 of this title, or (2) by practicing discrimination, shall be fined at least $1,000 but not more than $20,000, imprisoned for not more than 2 years, or both.

Federal Rules of Criminal Procedure:

Rule 5. Initial Appearance Before the Magistrate

* * *

(c) Offense Not Triable by the United States Magistrate.

* * *

The Magistrate shall also inform the defendant by his right to a preliminary examination.

* * *

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If

the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

Rule 7. The Indictment and the Information

(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

* * *

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No. 80-1759

In the Supreme Court of the United States

OCTOBER TERM, 1980

YELLOW FREIGHT SYSTEM, INC., AND DUNCAN CERAMICS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

MICHAEL L. MARTIN
Special Assistant
United States Attorney

Interstate Commerce Commission
Washington, D.C. 20423

QUESTIONS PRESENTED

1. Whether petitioners may take an interlocutory appeal from a pretrial ruling that they were properly charged by information rather than a grand jury indictment.

2. Whether petitioners have a right to be charged by an indictment even though the allegations against them cannot under any circumstances result in imprisonment.

3. Whether petitioners may take an interlocutory appeal from a pretrial ruling that they are not entitled to a preliminary hearing on charges set forth in an information.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statutory provision involved 1

Statement 2

Argument 3

Conclusion 12

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 ..... 4, 5, 6, 7, 8, 10

Armored Transport, Inc. v. *United States*, cert. denied, No. 80-948 (Mar. 2, 1981) 9

Bain, Ex parte, 121 U.S. 1 7

Beck v. *Washington*, 369 U.S. 541 11

Berman v. *United States*, 302 U.S. 211 4

Cobbledick v. *United States*, 309 U.S. 323 ..... 4, 6

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 ..... 4, 10

DiBella v. *United States*, 369 U.S. 121 4

Duke v. *United States*, 301 U.S. 492 10

Firestone Tire & Rubber Co. v. *Risjord*, No. 79-1420 (Jan. 13, 1981) 4, 5

Gerstein v. *Pugh*, 420 U.S. 103 ..... 10, 11

Page

Cases—Continued:

Green v. *United States*, 356 U.S. 165 10

Heike v. *United States*, 217 U.S. 423 6

Helstoski v. *Meanor*, 442 U.S. 500 ..... 5, 6

Kordel v. *United States*, 335 U.S. 345 10

Lem Woon v. *Oregon*, 229 U.S. 586 11

Mackin v. *United States*, 117 U.S. 348 9

Ocampo v. *United States*, 234 U.S. 91 11

Parr v. *United States*, 351 U.S. 513 6

Roche v. *Evaporated Milk Association*, 319 U.S. 21 6

Stack v. *Boyle*, 342 U.S. 1 5

United States v. *Calandra*, 414 U.S. 338 7

United States v. *Central Liquor Co.*, 628 F. 2d 1264, cert. denied, No. 80-556 (Dec. 1, 1980) 6

United States v. *Griffin*, 617 F. 2d 1342 ..... 7, 8

United States v. *MacDonald*, 435 U.S. 850 ..... 4, 6, 11

United States v. *Sorren*, 605 F. 2d 1211 6

United States v. *Wilson*, 639 F. 2d 500 ..... 7, 8

United States v. *Wright*, 622 F. 2d 792, cert. denied, No. 80-5469 (Nov. 3, 1980) 6

Wilson, Ex parte, 114 U.S. 417 10

Page

Constitution, statutes and rules:

United States Constitution, Fifth Amendment 7, 9

Interstate Commerce Act, 49 U.S.C. 1 *et seq.*, and as recodified by the Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337, 49 U.S.C. (Supp. III) 10101 *et seq.* 2

49 U.S.C. 41 2
49 U.S.C. 41(1) 1, 2, 10
49 U.S.C. (Supp. III) 11903 2

28 U.S.C. 1291 4

Fed. R. Crim. P. :

Rule 5 11
Rule 5(a) 12
Rule 5(c) 11
Rule 5.1(a) 12
Rule 5.1(b) 12

Miscellaneous:

Advisory Committee Notes to Fed. R. Crim. P. 5 11

1 C. Wright, *Federal Practice and Procedure* (1969) 10

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 637 F. 2d 1248. The opinions of the district court (Pet. App. A15-A17) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 17, 1980. A petition for rehearing was denied on February 20, 1981 (Pet. App. A13-A14). The petition for a writ of certiorari was filed on April 18, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

49 U.S.C. 41(1) provides in relevant part:

> * * * Every person or corporation, whether carrier or shipper, who shall, knowingly offer, grant, or give, or solicit, accept or receive any * * * rebates, conces-

sion, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000: *Provided,* That any person, or any officer or director of any corporation subject to the provisions of sections 41, 42, or 43 of this title or of the Act to regulate commerce and the Acts amendatory thereof * * * or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. * * *[1]

STATEMENT

The relevant facts in this case, which are not in dispute, are set forth in the opinion of the court of appeals (Pet. App. A2-A3). Petitioners are two corporations. Petitioner Yellow Freight System is a motor carrier. Petitioner Duncan Ceramics is a manufacturer and user of freight services. In November 1977, the United States filed informations against petitioners in the United States District Court for the Eastern District of California. Those informations alleged that on 50 occasions petitioner Yellow Freight System gave, and petitioner Duncan Ceramics received, rate concessions on interstate shipments of goods, in violation of the Elkins Act, 49 U.S.C. 41. Section 41(1) of the Act proscribes rate concessions and imposes a fine of $1,000 to

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[1]After the filing of the informations against petitioners under 49 U.S.C. 41(1), the Interstate Commerce Act was recodified. See Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337, 49 U.S.C. (Supp. III) 10101 *et seq.* The penal provision relevant to this case now appears at 49 U.S.C. (Supp. III) 11903. The recodification introduced no substantive change in the law. Section 3 of Pub. L. No. 95-473, 92 Stat. 1466, provides that the new statute "may not be construed as making a substantive change in the laws replaced," and that offenses committed under prior law are deemed to be offenses committed under the corresponding provision of the new law.

$20,000 on corporations that violate the Act. Natural persons who engage in the grant or receipt of illegal concessions may be imprisoned in a penitentiary for up to two years. *Ibid.*

In April 1979, petitioners moved to dismiss the informations. They contended that the informations were defective because they alleged "infamous" crimes that could not be prosecuted without a grand jury indictment. They also contended that the prosecutions could not proceed without a preliminary finding of probable cause. The district court denied those motions (Pet. App. A15-A17), noting, *inter alia*, that petitioners are corporations not subject to imprisonment and that a charge against a corporation under the Elkins Act, which can result in nothing more than a fine or forfeiture, is not an allegation of an "infamous crime" requiring indictment by a grand jury.

Petitioners attempted to take an immediate appeal from the district court's pretrial ruling denying their motions to dismiss the informations. The court of appeals affirmed the district court's decision in part, and dismissed the attempted interlocutory appeal in part. The court affirmed the district court's ruling that petitioners had no right to be prosecuted pursuant to a grand jury indictment (Pet. App. A8-A12). It also held that petitioners' claims concerning their entitlement to a finding of probable cause were not appealable on an interlocutory basis, and dismissed the appeal relating to that issue (*id.* at A6-A8). In refusing to entertain an interlocutory appeal on that issue, the court of appeals noted that petitioners' theory concerning their entitlement to a probable cause determination was "foreclosed" by decisions of this Court (*id.* at A8).

ARGUMENT

1. Petitioners argue (Pet. 5-18) that they were entitled to be charged by a grand jury and therefore the informations against them should be dismissed. They assert that, because natural persons may receive two-year prison sentences for

violations of the Elkins Act, similar violations by corporations must be deemed "infamous crimes" even though Congress has provided that corporations are subject only to fines. That contention is not subject to appeal on an interlocutory basis. In addition, the contention is foreclosed by governing decisions of this Court.

Although the court of appeals entertained petitioners' interlocutory appeal on the grand jury issue and decided the question adversely to petitioners on the merits, we submit that interlocutory review is barred by the final judgment requirement embodied in 28 U.S.C. 1291. The finality requirement contemplates a lower court decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." See *Firestone Tire & Rubber Co.* v. *Risjord*, No. 79-1420 (Jan. 13, 1981), slip op. 5; *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940). And, of course, "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." *Berman* v. *United States*, 302 U.S. 211, 212 (1937). Adherence to the rule of finality is particularly important in criminal cases because "the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." *DiBella* v. *United States*, 369 U.S. 121, 126 (1962); see also *United States* v. *MacDonald*, 435 U.S. 850, 853-854 (1978); *Abney* v. *United States*, 431 U.S. 651, 656 (1977).

The traditional requirement of a final judgment is not satisfied here since the denial of petitioners' motion to dismiss obviously did not terminate the criminal proceedings in the district court. The court of appeals nonetheless concluded that the district court's order was immediately appealable because it satisfied the standards for the "collateral order" exception to the final judgment rule, which was first pronounced in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and since then applied in only

three criminal cases: *Stack* v. *Boyle*, 342 U.S. 1 (1951) (reasonable bail guarantee); *Abney* v. *United States*, *supra* (double jeopardy guarantee); *Helstoski* v. *Meanor*, 442 U.S. 500 (1979) (speech or debate privilege). However, as this Court recently emphasized in *Firestone Tire & Rubber Co.* v. *Risjord*, *supra*, slip op. 6, the collateral order exception is "a narrow exception" that applies only to a "small class" of interlocutory orders. In particular, an interlocutory order will not be afforded immediate review if effective review may be had after completion of trial. *Id.* at 7.[2]

The claim that an accused has been deprived of a right to indictment by a grand jury is not one that will be irreparably lost unless vindicated in a pretrial appeal, and it does not fall within the "small class" of interlocutory orders subject to immediate review. Should petitioners ultimately be convicted, their claim that the institution of the prosecution was defective could be fully litigated in the normal course of appeal from a final judgment. That, of course, requires petitioners to proceed to trial on the merits, but the desire to avoid the burdens of trial is not a basis for departing from the final judgment rule (except in the special circumstances

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[2]The cases in which this Court has permitted "collateral order" appeals have little similarity to the present case. In *Abney*, the defendant was subjected to a *retrial* over his objection that the second trial was barred by the Double Jeopardy Clause. Petitioners, in contrast, have not yet defended themselves in any trial. In *Helstoski*, the Court held that a Congressman was entitled to an interlocutory appeal to assert his Speech or Debate Clause privilege because the Speech or Debate Clause was designed to protect Congressmen "not only from the consequences of litigation's results but also from the burden of defending themselves" (442 U.S. at 508). In *Stack*, the Court concluded that a delayed appeal of the issue of bail entitlement would totally undermine the constitutional right to reasonable bail prior to and during trial. In each of these cases, the particular nature of the constitutional guarantee and the facts of record led to the conclusion that the interlocutory orders in question were "effectively unreviewable on appeal from a final judgment." *Firestone Tire & Rubber Co.* v. *Risjord Co.*, *supra*, slip op. 7.

involved in *Abney* and *Helstoski*). As this Court observed in *Cobbledick* v. *United States, supra,* 309 U.S. at 325-326:

> Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must wait his conviction before its reconsideration by an appellate tribunal.

Accord, *Roche* v. *Evaporated Milk Association,* 319 U.S. 21, 30 (1943); *United States* v. *MacDonald, supra,* 435 U.S. at 860 n.7.

Accordingly, both this Court and the courts of appeals frequently have held that claims of defects in the institution of a prosecution are insufficient to establish the kind of irreparable damage that would warrant an immediate appeal. See, *e.g., United States* v. *MacDonald, supra,* 435 U.S. at 860 (claim that an indictment was barred by the Sixth Amendment's Speedy Trial guarantee); *Abney* v. *United States, supra,* 431 U.S. at 662-663 (claim that an indictment did not state an offense); *Parr* v. *United States,* 351 U.S. 513, 518-521 (1956) (claim that a superseding indictment had been improperly brought to defeat the defendant's successful transfer motion); *Heike* v. *United States,* 217 U.S. 423, 430-431 (1910) (claim that an indictment was barred because of a statutory immunity grant).[3] Petitioners' claim here does not differ materially from the

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[3]See also *United States* v. *Central Liquor Co.,* 628 F. 2d 1264, 1266 (10th Cir.), cert. denied, No. 80-556 (Dec. 1, 1980) (claim that the prosecutor improperly pyramided charges to prejudice the defendant at trial); *United States* v. *Wright,* 622 F. 2d 792, 793-794 (5th Cir.), cert. denied, No. 80-5469 (Nov. 3, 1980) (claim of prosecutorial abuse and overreaching); *United States* v. *Sorren,* 605 F. 2d 1211, 1213-1215 (1st Cir. 1979) (claim of lack of personal jurisdiction due to governmental involvement in defendant's abduction in a foreign country).

claims in the foregoing cases, where the courts properly have denied interlocutory appeals despite assertions that the defendants were immune from federal prosecution on various statutory and constitutional grounds.[4]

In the wake of *Abney*, the Ninth Circuit has taken a singularly expansive view of the kinds of interlocutory orders that should be treated as collateral to a criminal case and therefore appealable before trial. It has permitted interlocutory appeals not only of claims that a proceeding was improperly instituted for lack of an indictment, as here, but also of claims that certain portions of an indictment have been added as a result of prosecutorial vindictiveness (*e.g.*, *United States* v. *Griffin*, 617 F. 2d 1342 (1980)) and that there has been impermissible selective prosecution (*United States* v. *Wilson*, 639 F. 2d 500 (1981)). The consequence of this position has been a plethora of pretrial appeals in the Ninth Circuit that have both burdened the court and delayed the prompt administration of criminal justice, even though the vast majority of these appeals were found lacking in merit. This situation has been of concern not only to the Department of Justice, but to at least some of the judges on the Ninth Circuit itself. See *United States* v. *Wilson*, *supra*, 639 F. 2d at 502 n.1.

It may well be that we will ask this Court at some point to undertake review of the propriety of the Ninth Circuit's expansive allowance of interlocutory appeals. This might be done even in a case in which the claims on the merits are not substantial, as was the situation in *Abney*. We do not do so in the present case for two reasons. First, we believe that there presently exists a realistic prospect that the Ninth

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[4]The underlying purpose of the Fifth Amendment's Indictment Clause—to protect against false charges or unwarranted harassment (see *United States* v. *Calandra*, 414 U.S. 338, 342-343 (1974); *Ex parte Bain*, 121 U.S. 1, 11 (1887))—can be effectuated by dismissal of any improper prosecution by an appellate court.

Circuit would be willing to reconsider its position in this area, and we are seeking an appropriate case in which to ask it to undertake en banc review of the jurisdictional issue.[5] Should it agree to do so and, upon reconsideration, overrule decisions such as *Griffin* and *Wilson*, there may be no need for this Court to consider the question, since, at least at present, we are not aware of any other circuits that have followed the lead of the Ninth Circuit in expanding the availability of interlocutory appeals in criminal cases.

Our second reason for not inviting review of the jurisdictional issue in the present case is that the particular claim held reviewable here—the need for an indictment—is one that arises infrequently. If the Court is to review the appealability issue, we believe it would be preferable to do so in a vindictive prosecution case, which, along with *Abney* claims, makes up the bulk of pretrial appeals in criminal cases in the Ninth Circuit. Indeed, because of the difference in character between the instant claim and vindictive or selective prosecution claims, it is uncertain whether a decision of the jurisdictional issue in the present case would resolve the more important issue in the other, more common cases.

2. In any event, even if petitioners' arguments about their right to a grand jury indictment were properly before this Court at this time, the court of appeals correctly ruled on the merits that petitioners do not have a constitutional right to be charged by indictment (Pet. App. A8-A12).

Petitioners argue broadly (Pet. 5-18) that because the Elkins Act provides for a possible punishment of two years' imprisonment for natural persons, any offense under the Elkins Act is therefore an "infamous" crime and is chargeable only by grand jury indictment. However, petitioners

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[5]It is, of course, somewhat difficult for us to request en banc rehearing in cases in which we have prevailed on the merits.

wholly ignore the fact that, under the statute, Congress has prescribed separate punishments for corporations and natural persons. Because petitioners are corporations, they cannot, under any circumstances, be subjected to imprisonment. As the court of appeals emphasized (Pet. App. A9 & n.6), the Elkins Act treats individuals and corporations differently and "by its terms limits penitentiary confinement to individuals."[6]

The court of appeals correctly ruled that a corporation, which cannot be subjected to the penalty of imprisonment, is not exposed to infamous punishment and is not entitled to be indicted by a grand jury. There is no conflict among the circuits. No court has ever held that a corporation, exposed only to fines for violation of a regulatory statute, must be prosecuted by indictment. Moreover, this Court recently denied review in a case presenting the same issue under the Sherman Act. See *Armored Transport, Inc.* v. *United States*, cert. denied, No. 80-948 (Mar. 2, 1981).[7] Petitioners offer no reason for granting review of the same question in this case.

The decisions of this Court establish that it is the nature of the punishment that may be imposed upon the defendant, not the abstract nature of the offense, which determines whether the crime is infamous for purposes of the Indictment Clause of the Fifth Amendment. See, *e.g.*, *Mackin* v. *United States*, 117 U.S. 348, 350 (1886). Punishment by fine, rather than by imprisonment in a penitentiary for more

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[6]Petitioners concede (Pet. 17-18) that "[i]f the maximum prison term provided for in the statute is over one year, it is an infamous crime. If the maximum sentence is one year or less, it is most likely not infamous * * *." Applying that standard, it is plain that the crimes alleged in this case are not "infamous crimes," since petitioners are exposed to no prison sentences at all.

[7]We are forwarding a copy of our brief in opposition in *Armored Transport* to petitioners.

than one year, demonstrates that the offense is not "infamous." See, *e.g., Green* v. *United States,* 356 U.S. 165, 183 (1958); *Kordel* v. *United States,* 335 U.S. 345, 348 n.3 (1948); *Duke* v. *United States,* 301 U.S. 492, 493-495 (1937); *Ex parte Wilson,* 114 U.S. 417, 423-426 (1885); see also 1 C. Wright, *Federal Practice and Procedure* § 121, at 212-213 (1969) (collecting cases). Accordingly, because petitioners are subject only to a fine under 49 U.S.C. 41(1), and are not "in danger of being subjected to an infamous punishment if convicted," the Constitution does not require the government to proceed by indictment. *Ex parte Wilson, supra,* 114 U.S. at 426.

3. Petitioners finally argue (Pet. 18-28) that, if only an information is required to bring charges against them, a pretrial judicial finding of "probable cause" is a prerequisite to holding them to answer. The district court rejected that claim on the merits and the court of appeals declined to reach it for want of appellate jurisdiction. The court of appeals noted that petitioners have failed to assert an "important right" (see *Abney* v. *United States, supra,* 431 U.S. at 658) that requires immediate appellate review, since petitioners rely on "a legal theory foreclosed by the Supreme Court" (Pet. App. A8).[8] In particular, the court of appeals found that petitioners' argument was defeated by this Court's decision in *Gerstein* v. *Pugh,* 420 U.S. 103, 119 (1975), which reaffirmed the well-established rule that "a judicial hearing is not prerequisite to prosecution by information."

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[8]In the seminal decision of *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546-547 (1949), which originally prescribed the "collateral order" exception to the final judgment rule, this Court emphasized that the claim raised by the interlocutory appeal in that case presented "a serious and unsettled question" and that the question was "too important to be denied review." When it appears that the contention sought to be litigated on appeal is foreclosed by a decision of this Court, however, it is wholly proper to summarily dismiss the appeal. *Ibid.*

We agree with the court of appeals that petitioners are not entitled to interlocutory review of their probable cause contention. For the reasons summarized on pages 4-7, *supra*, that claim does not involve a right that would be irreparably lost absent immediate review. If petitioners have been wrongly denied a probable cause hearing, they may present that contention in the court of appeals following a final judgment. The fact that petitioners will be forced to stand trial due to the denial of immediate appellate review is not a basis for departing from the final judgment requirement. See *United States* v. *MacDonald*, *supra*, 435 U.S. at 860 n.7.

We also agree that prior decisions of this Court establish that petitioners' claim is frivolous. In addition to the *Gerstein* case, which reaffirms that a preliminary finding of probable cause is not required before proceeding to trial on an information, see *Beck* v. *Washington*, 369 U.S. 541, 545 (1962), which notes that prosecutions by information have been filed "on many occasions without even a prior judicial determination of 'probable cause' " and have "had approval here." See, *e.g.*, *Ocampo* v. *United States*, 234 U.S. 91, 100-101 (1914); *Lem Woon* v. *Oregon*, 229 U.S. 586, 587-590 (1913). Petitioners cite no relevant authority to the contrary.[9]

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[9]Petitioners refer to Fed. R. Crim. P. 5 in support of their argument that a preliminary hearing is required. However, Rule 5(c) states unequivocally that a "preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination." The Notes of the Advisory Committee on the 1972 amendments to Rule 5 point out that the Rule "makes clear that a defendant is not entitled to a preliminary examination if he has been indicted by a grand jury prior to the date set for the preliminary examination, or, in appropriate cases, if any information is filed in the district court prior to that date." As

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

MICHAEL L. MARTIN
Special Assistant
United States Attorney
Interstate Commerce Commission

JUNE 1981

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noted above, this is an "appropriate case" for prosecution by information. Accordingly, there is no need for a judicial finding of "probable cause."

Finally, we note that one of the principal purposes of a probable cause hearing—to avoid unnecessary pretrial incarceration of persons arrested by law enforcement officers on insufficient grounds—is completely inapplicable to a corporate defendant not subject to arrest and incarceration. See Fed. R. Crim. P. 5(a), 5.1(a)-(b).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY BRIEF

ROBERT POPPER
(Counsel of Record)
School of Law
University of Missouri-Kansas City
5100 Rockhill Road
Kansas City, Missouri 64110
(816) 276-1651

RONALD E. SANDHAUS
Attorneys for Petitioners

Of Counsel:
ROBERT G. CARTER
TREVOR C. CLEGG
DEAN A. BAILEY

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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PETITIONERS' REPLY BRIEF

In its brief in opposition, the United States refers to the interlocutory nature of the review given by the Court of Appeals in this case. Devoting more than half of its brief to this point but refusing to formally bring the issue before the Court by a cross-petition, the government obfuscates the true importance of the case. The real thrust of the petition, as reflected in the questions presented, concerns the government's tactical ploy of bringing an accused to trial on a serious criminal charge solely on the decision or whim of the prosecutor, without any attempt to obtain the approval of a grand jury or a judicial officer.

The government relies on two reasons for not requesting review of the preliminary jurisdictional issue. Neither reason is substantial. The first is merely speculative; namely, that it is realistic to expect that the Ninth Circuit, in some future case, will reverse itself and limit pretrial appeals. (Brief in Opp., pp. 7-8). In fact, that court has been consistent in refusing to follow the government's suggestion to take an unduly restrictive approach to such appeals. *United States v. Yellow Freight, Inc.*, 637 F.2d 1248, 1250-52 (9th Cir. 1980) (right to indictment); see, *United States v. Wilson*, 639 F.2d 500 (9th Cir. 1981) (selective prosecution); *United States v. Griffin*, 617 F.2d 1342 (9th Cir. 1980) (vindictive prosecution). And the Ninth Circuit's position is consistent with this Court's precedent authorizing pre-trial appeals from final decisions under 28 U.S.C. § 1291. *Helstoski v. Meanor*, 442 U.S. 500 (1979); *Abney v. United States*, 431 U.S. 651 (1977); *Stack v. Boyle*, 342 U.S. 1 (1951). Significantly, the government, when it deems it appropriate, invokes the procedure approved by the Ninth Circuit and presses its own interests through pre-trial appeals. See, *e.g.*, *United States v. Baker*, 603 F. 2d 759 (9th Cir. 1979).

The government also contends that other circuits differ with the Ninth and disallow pre-trial appeals. This is not so. See, *e.g.*, *In re Grand Jury Proceedings*, 636 F.2d 81, 83-84 (5th Cir. 1981) (reimbursement of costs of complying with grand jury subpoena); *In re Investigation Before February, 1977, Lynchburg Grand Jury*, 563 F.2d 652, 655-56 (4th Cir. 1977) (disqualification of specific attorneys from representing witnesses before grand jury); *United States v. Alessi*, 544 F.2d 1139 (2d Cir. 1976), cert. denied, 429 U.S. 960 (1976) (indictment in violation of earlier plea agreement); *United States v. King*, 482 F.2d 768, 770-73 (D.C. Cir. 1973) (accused's right to reopen preliminary hearing to call and examine complaining witness); *United*

States v. Doe, 455 F.2d 1270, 1272-74 (1st Cir. 1972) (propriety of federal grand jury obtaining evidence for use in trial pending in another district).

The second reason the government gives for failing to request review of the appealability issue is that the petitioners' underlying claims are ones that arise infrequently. (Brief in Opp., p. 8). This too is speculative. The government cites no statistics and points to no facts in support of its conclusion. The number of prosecutions brought against corporations without first obtaining an indictment or establishing probable cause is simply not known; and similar conduct by the government in future prosecutions cannot even be surmised.

For the foregoing reasons, the appealability issue is not one that can properly influence whether the petition should be granted. Instead, the underlying questions presented by the petitioners must be faced and evaluated.

The petition should be granted, and the writ of certiorari should issue.

Respectfully submitted,

ROBERT POPPER
(Counsel of Record)
School of Law
University of Missouri-Kansas City
5100 Rockhill Road
Kansas City, Missouri 64110
(816) 276-1651
RONALD E. SANDHAUS
Attorneys for Petitioners

Of Counsel:
ROBERT G. CARTER
TREVOR C. CLEGG
DEAN A. BAILEY

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